S. HRG. 100-577, PT. 2

AUTHORIZATION LEGISLATION AND OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE (Antitrust and Civil Divisions)

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE DEPARTMENT OF JUSTICE AUTHORIZATION ACT FOR FISCAL YEAR 1988

FEBRUARY 4 AND 19, 1987

Serial No. J-100-1

Part 2 of 4

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

81-595 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-17

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AUTHORIZATION LEGISLATION AND OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

(Antitrust Division)

WEDNESDAY, FEBRUARY 4, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard Metzenbaum presiding.

Also present: Senators Thurmond, Simon, Heflin, Grassley, and Humphrey.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. The meeting will come to order.

The Chairman has been detained and will be with us soon, but something has come up and there has been some delay. So rather than not start, we would be very happy to hear from Mr. Rule.

Mr. Rule, do you have any idea how long a statement you have?

Mr. RULE. I think it is a four-page statement that we have submitted for the record. I thought I would read it. It should only take about 8 minutes to read.

Senator METZENBAUM. About 10 minutes?

Mr. RULE. Yes, sir.

Senator METZENBAUM. Fine.

Mr. RULE. Thank you.

Senator METZENBAUM. Senator Grassley, we are happy to welcome you.

Senator GRASSLEY. Yes. I have no opening statement.

Senator METZENBAUM. Well, I decided to waive the great message that I had so we might hear from Mr. Rule. I have told Mr. Rule, and I will say to the audience, that I have to leave at 2:25. I will return after that, but a meeting has come up that I just must attend at 2:30.

In my absence, if Senator Biden has not returned, Senator Simon will preside.

Did you have an opening statement?

Senator SIMON. I do not.

Senator METZENBAUM. I wish to place a statement by Senator Hatch in the record at this point.

[Prepared statement follows:]

STATEMENT OF SENATOR ORRIN G. HATCH

FEBRUARY 4, 1987

MR. RULE, I WOULD LIKE TO WELCOME YOU BACK TO THE JUDICIARY COMMITTEE. WE HAVE CERTAINLY APPRECIATED YOUR OPENNESS AND FRANKNESS WITH THE COMMITTEE IN THE PAST WHEN YOU HAVE TESTIFIED. WE LOOK FORWARD TO YOUR REMARKS TODAY.

THE THEORETICAL UNDERPINNINGS OF THE ANTITRUST LAWS THEMSELVES HAVE BECOME HAVE BECOME THE SUBJECT OF CONSIDERABLE DEBATE. COMMENTATORS OF NO LESS NOTE THAN ROBERT BORK, NOW A CIRCUIT JUDGE, HAVE NOTED: "MODERN ANTITRUST HAS SO DECAYED THAT THE POLICY IS NO LONGER INTELLECTUALLY RESPECTABLE. SOME OF IT IS NOT RESPECTABLE AS LAW; MORE OF IT IS NOT RESPECTABLE AS ECONOMICS; AND . . . A GREAT DEAL OF ANTITRUST IS NOT EVEN RESPECTABLE AS POLITICS." THOSE ARE PRETTY STRONG WORDS -- EVEN POLITICS IS MORE RESPECTABLE THAT SOME ASPECTS OF ANTITRUST LAW.

I DO NOT RAISE THIS POINT TO RECOMMEND ANY SWEEPING CHANGES IN ANTITRUST ENFORCEMENT, BUT ONLY TO ACKNOWLEDGE THAT OUR ENTIRE BODY OF ANTITRUST JURISPRUDENCE IS IN THE MIDST OF AN ERA OF SEARCHING QUESTIONING AND RECONSIDERATION. ACCORDINGLY, IT WOULD BE UNUSUAL INDEED IF YOUR ENFORCEMENT OF THOSE POLICIES WERE NOT SEARCHINGLY QUESTIONED.

FOR MY PART, I WOULD LIKE TO COMMEND YOUR EFFORTS TO ENSURE HEALTHY COMPETITION WHILE RECOGNIZING THAT THE MARKET ITSELF MAY OFTEN BE THE MOST ROBUST PROTECTOR OF THE CONSUMER'S WELFARE. IN THIS CONNECTION, I WOULD NOTE THAT WHILE THE SIZE OF GOVERNMENT IS GENERALLY SHRINKING DUE TO THE PRESSURES OF GRAMM-RUDMAN, THE ANTITRUST DIVISION HAS VIGOROUSLY PURSUED ITS MISSION.

THE DIVISION HAS CONTINUED TO PROSECUTE CRIMINAL PRICE FIXING AT HIGH RATES OF EFFICIENCY. IN CONNECTION WITH MERGER OVERSIGHT, I NOTE THAT THE DIVISION ONLY RECENTLY FILED FIVE CASES QUESTIONING THE COMPETITIVE PROPRIETY OF PROPOSED

MERGERS. IN THAT REGARD, IT WAS THE ANTITRUST DIVISION THAT QUESTIONED THE CONRAIL SALE. I PERSONALLY FAVORED THAT SALE, BUT THIS ONLY VERIFIES THAT IN THIS TIME OF QUESTIONED ANTITRUST POLICIES YOUR PRIORITIES WILL OFTEN DIFFER WITH THE VIEWS OF VARIOUS MEMBERS OF THIS COMMITTEE OR ANY OTHER BODY LOOKING AT ANTITRUST ENFORCEMENT FROM THE OUTSIDE. OF COURSE, THE DIVISION'S CAREFUL AND CONTINUING SCRUTINY OF THE TELECOMMUNICATIONS INDUSTRY MUST ALSO BE COMMENDED.

NO DOUBT AS WE BEGIN TO EXAMINE SOME OF THE DETAILS OF ANTITRUST ENFORCEMENT, WE WILL HAVE OCCASIONAL DIFFERENCES OF OPINION. NOTHING LESS CAN BE EXPECTED WHEN THE ENTIRE FIELD OF ANTITRUST LAW HAS BEEN THE SUBJECT OF VOLATILE DEBATE. NONETHELESS I WISH TO COMMEND YOU AND THE DIVISION FOR DILIGENCE IN PROCESSING THE FLOOD OF MERGER FILINGS AT THE END OF 1986 PROMPTED BY THE TAX LAW CHANGES AND FOR YOUR DILIGENCE IN GENERAL IN FULFILLING YOUR IMPORTANT RESPONSIBILITIES.

Senator METZENBAUM. Please proceed.

STATEMENT OF CHARLES F. RULE, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. RULE. Thank you, Senator, and members of the committee. I appreciate the opportunity to appear this afternoon in support of the Department's budget request for the Antitrust Division for fiscal year 1988 of 565 positions, 562 work years and $46,401,000.

This request reflects a program decrease of 100 positions, 85 work years, and $2,109,000, a transfer from the Interstate Commerce Commission of 16 positions and 16 work years and $843,000, and a net increase in uncontrollable expenses of $3,623,000. The major uncontrollable items are increases of $1,286,000 for contributions to the revised Federal retirement plan and $940,000 for office space rentals to the General Services Administration.

Vigorous prosecution of hard-core horizontal antitrust violations, such as price fixing, bid-rigging and market allocation among competitors, has been and will continue to be the Antitrust Division's primary enforcement activity.

During fiscal year 1986, the Division filed 53 criminal cases against 69 corporations and 60 individuals. During the same period, fines were assessed in the amount of $10.7 million and sentences of 16,691 jail days, or approximately 45.7 years, were imposed, of which 32,820 days, or approximately 10.5 years, were actually served by antitrust violators. In addition, the Division recovered nearly $1.5 million in damages suffered by the United States as a result of antitrust violations.

During the first 4 months of fiscal 1987, the Division filed 30 criminal cases involving 26 corporations and 26 individuals, a pace that exceeds the number of criminal cases initiated during the previous 2 years and which would approximate the number of criminal cases filed during fiscal years 1982 through 1984, which averages 97.3 such cases per year.

Thus far, fines in the amount of $6.7 million and jail terms of 90 days have been assessed during this year. During the same four-month period, the Division filed suit challenging three mergers and we have announced our intention to challenge two others if the parties proceed with the transactions as planned.

At least partly as a result of last year's changes in the tax laws, Hart-Scott-Rodino premerger notification filings increased significantly during the later portion of calendar year 1986.

For example, filings for October and November were 1,301, an increase from 586 filed in those months during the previous year. Despite the heavy volume of Hart-Scott-Rodino filings, the Division nevertheless continued to review every filing within the prescribed statutory time limits and investigated those that raised competitive concerns.

During these times of budget reduction necessitated by efforts to reduce Federal spending and the Federal deficit, the Division will do its part. Our budget may be small relative to the overall Federal budget. However, all Federal managers have an obligation to seek out cuts that can be made without hurting their core programs.

The cuts proposed by the Division are driven by this desire to cut the Federal deficit, not by an attempt to achieve some other policy objective.

We believe we can maintain, and even increase, our law enforcement program, despite the budgetary reductions I have described. We will do this by concentrating on the Division's core mission, to uncover and prosecute unambiguously harmful conduct and to review mergers.

In recent years, the Division has had particular success in prosecuting bid-rigging, especially in road and airport construction, electrical contracting, and utility construction. We will continue to pursue criminal investigations into bid-rigging, price fixing, and market allocation on government procurement contracts, with special focus on defense procurement.

We will also maintain our merger screening program and investigate and challenge, where necessary, those mergers and acquisitions that threaten harm to consumers.

We fully support the important goal of maintaining a strong antitrust enforcement presence in our economy. As we demonstrated during the past few months, the Division can adapt its resources to changes in marketplace developments as necessary.

We fully expect that we will be able to continue to fulfill our essential law enforcement responsibilities by focusing on the core programs of prosecuting criminal conduct and evaluating mergers and acquisitions with the budget we have proposed.

We anticipate that the proposed reduction in resources for fiscal year 1988 will be attained through attrition and will be applied primarily to the Division's amicus and competition advocacy programs, general policy and economic analysis, management, and administrative support.

Much of these savings in resources are possible by reason of improved efficiency, better use of staff and automated resources, and streamlined reporting, economic analysis and support functions.

If we determine that our core antitrust enforcement efforts are likely to suffer as a result of these proposed reductions, the Division will not hesitate to seek additional resources to ensure that consumers are not threatened with significant economic harm from activities that violate the antitrust laws.

At this time, however, I am confident that we can continue our vital law enforcement efforts with the resources that have been proposed, while at the same time making our proper contribution to the critical need to reduce the Federal deficit and Federal spending.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions the members of the committee may have.

Senator METZENBAUM. We will adopt a 10-minute rule.

Mr. Rule, it is no secret that I believe that the Administration has abdicated its responsibility in the area of antitrust, and I think the lax attitude is evident in many ways.

Only very rarely have there been challenges to otherwise unbridled merger activity, and acquisitions that corporate America would not even have dreamed of, let alone tried, 10 years ago are going through the Department without any problem at all.

The conspicuous failure to bring vertical price-fixing cases is upsetting because it has a direct impact on the consumers of this country and really eliminates the opportunity for free competitive forces to work.

Instead of the Administration being in a supporting position as pertains to competition, their failure to move into vertical price-fixing cases has resulted in competition being frustrated, throttled.

The repeated intervention by the Administration on the defendant's side in so many cases as an amicus in the appellate courts is something new. We never had that before; we never had it in any previous Republican or Democratic administration.

And then we find your Department consistently relying on economists to come up with reasons not to enforce the antitrust laws. No previous administration has thrown the ball over to the economists as much as this Administration has.

Now, frankly, just when I thought antitrust enforcement could not get any worse and just when I thought this Administration could not send any stronger go-ahead signs to corporate America, the Administration submitted the Antitrust Division fiscal year 1988 budget, which cuts 100 positions in the Antitrust Division.

It also eliminates the Antitrust Division's line item and throws the Division budget in with General Legal Activities. Now, I heard your statement saying, well, if there is a problem, you may be sure we will come back.

Coming back to this Congress, with all of the budgetary constraints, is just hopeless. There is no chance, and that is the reason that I do not intend, to the extent possible, to permit you to eliminate the Antitrust Division's lines item and to cut back on 100 positions because I believe that all you are saying to corporate America is it is your ball; run with it any way you want; we will not interfere with your activities. And I am concerned that too many antitrust employees, attorneys, will be diverted to other programs.

How do you explain to the American people that you are cutting personnel when the number of mergers is steadily increasing? How would you rationalize that?

Mr. RULE. Well, Senator, I think that, first of all, it depends on which time period you look at, but let us assume that we take 1986 as an indication of what may happen in 1987, and as your chart over here shows, there were 1,938 Hart-Scott-Rodino filings.

The fact is that I believe our merger guidelines have made clear, along with the development of the case law over the last 10 to 15 years—made clear the dividing line between mergers that do not involve or create problems under the antitrust laws and those that do.

As a result, there is a whole broad area of mergers that simply do not raise antitrust issues. It is important to keep in mind that there are a number of reasons that companies decide that they want to merge or that they want to have an acquisition that results in a Hart-Scott-Rodino filing.

For example, as we all know, over the last several years the Dow Jones Index has more than doubled. What that means is a lot of people have looked around and seen assets and stocks that they felt were previously undervalued and engaged in a lot of activity to recognize that value. A lot of the mergers involve that; they do not

involve competing corporations and they do not involve the antitrust laws.

Another source of these mergers is the fact that, as we all know, we are increasingly facing foreign competition. The exchange rates are changing and companies are trying to adjust to these changes in market conditions, trying to revise their asset packages, if you will, so they can become more competitive.

And most recently, perhaps, the reason for what looked to be a merger surge, if you will, at the end of 1986, I think was pretty clearly caused by the significant tax reform that Congress passed last year.

When you shift the tax burden to corporations, what they have tried to do is obviously take advantage of the old tax rules where they pay fewer taxes and get those benefits before the rules changed, and many corporations tried to get in under the wire.

The benefits to them of getting in under the wire before the end of 1986 were measured in the millions and tens of millions of dollars, and most of those people, because they did not want to jeopardize those benefits, were unwilling to create problems by engaging in mergers that raised any competitive question.

Senator METZENBAUM. Well, Mr. Rule, look, the Antitrust Division staff has gone down 33 percent, from 939 to 565. The FTC staff has gone down 56 percent, from 802 to 354, and the civil cases filed and the average per year has gone done 47 percent. Between 1976 and 1979, they were filing 34 cases a year; between 1980 and 1985, 18 cases a year. And the premerger filings, meanwhile, have gone up from 824 in 1980 to 1,938, or an increase of 135 percent, in 1986.

Now, with all of that, you are saying, well, we do not need as many people to do the job. You are saying that there are good economic reasons for mergers to occur, and yet the facts are, and you know them, that many companies have made mergers and they have not worked out and they have had to dump out of the companies and they have taken big losses, and I could just give you a whole list of them.

But what we do not find in this Administration is that strength of conviction and determination to say that free, competitive forces ought to be permitted to work in this country, but rather an attitude that bigger is better.

And now you come to us and you say, well, we want to put all the Antitrust Division attorneys in with General Legal Activities, and we want to eliminate 100 people at that. It just does not add up.

Mr. RULE. The one thing I am sorry your chart does not show is a comparison of what has happened in the criminal area, because I think if you look, that is one area that I think you can agree, Senator, that this Administration has really taken the lead and developed an unprecedented number of criminal cases.

We have almost three times the grand juries currently sitting investigating antitrust offenses today as there were when the Reagan Administration came into office, and I think those statistics say a great deal.

With regard to these statistics, as I say, it is important to keep in mind that we only issued the Merger Guidelines in 1982, revised them in 1984. The staff in the Antitrust Division, the parties out

there who are thinking about mergers—the clarity of those Guidelines is increasing over time.

And as a result, the gray area where there are investigations and where you have to challenge mergers—and, indeed, as you know, we have indicated over the last 6 weeks challenges of four mergers, and we will step in and challenge them where they are going to harm consumers.

Senator METZENBAUM. Well, Mr. Rule——

Mr. RULE. But if they are not going to harm consumers, they are just not any of antitrust's business and not any of our business.

Senator METZENBAUM. Mr. Rule, I want to put one fiction to rest and then I will give up my time and recognize Senator Grassley.

This Administration has gone on TV programs, radio programs, on the lecture circuit and talked about all of the criminal actions that you have brought. Let us not kid ourselves.

What you have done in those criminal actions is you have gone after little bid-rigging cases for small highway contractors, and that has been where your main emphasis has been.

But you have not brought hardly any against the majors in this country who have been involved in violations of the antitrust laws. You have used that figure, but you have gone after a lot of small individuals whom you knew you pretty much had over a barrel, and it is just one category rather than a broad-based kind of attack on a criminal basis for the violations that have occurred.

Mr. RULE. Well, I would respond to that in this way. First of all, the road construction cases have actually come to more or less of a close. That was a string that was begun in 1979 and the cycle played out.

We have undertaken a new initiative with regard to defense procurement where there are some small companies involved and some big companies involved. I do not know what—I mean, I cannot speak because I am not out there running a corporation, but if the message has not gotten through loud and clear to corporate America, big and small, by now that we are very serious about prosecuting criminally people who engage in price fixing, bid-rigging and market allocation—I do not care if they do it on a local basis or a State basis or a regional basis or a national basis or an international basis—they are going to go to jail if we catch them, and we are very serious about that.

And if anyone has any information such a conspiracy, we will go after it. We would like to have that information and we would like nothing better than to stick those folks in jail.

Senator METZENBAUM. Senator Grassley.

And I will ask Senator Simon if he would be good enough to take over.

Senator GRASSLEY. What do you consider are the prospects of Judge Greene adopting the Department's recommendations relating to the line of business restrictions presently on the Bell operating companies.

Mr. RULE. Well, Senator, obviously, the judge and we are going to have to listen to the comments of folks based on the recommendations we submitted to the court. That will go through a period of public comment.

What we tried to do in forming our recommendations was take the standard that Judge Greene had set out in his decision, and that is whether or not allowing the Bell operating companies into these new markets threatens competitions in these markets that they seek to enter.

We conducted a year-long study with an expert, Peter Huber, who looked at the entire industry, looked at competition in all these markets. We have benefitted greatly over the last 5 years from our experience in dealing with the industry and, frankly, competition in all these markets has benefitted greatly as a result of the divestiture of AT&T.

What we are talking about is a vastly different industry, vastly different regulatory system, vastly different legal system, from what was in existence in 1982 when the decree was entered.

And I believe if Judge Greene and anyone else takes a careful look at our conclusions, they will agree that with regard to those line of business restrictions that we have dropped, the danger of the Bell operating companies going into those markets simply no longer warrants an absolute prohibition.

The antitrust laws, FCC and State regulation are adequate to deal with any problems that might arise.

Senator GRASSLEY. I do not disagree with anything you say and I appreciate the overview, but you do not feel at this point you can make any judgment of the possibilities of his adopting those recommendations?

Mr. RULE. Well, I am confident about our recommendations and I expect Judge Greene to address this with an open mind. It is his standard and I think we can convince him that we are right.

Senator GRASSLEY. Thank you.

Senator SIMON [presiding]. If I may ask this question, in talking to people who are engaged in private practice in the antitrust field, they say this really is a dormant area of practice of law today.

Antitrust lawyers up there, they are closing up shop, and they say it is because the Administration simply is not enforcing antitrust laws. Are all these lawyers wrong and are they just—why are they closing up shop if you are doing the job that you ought to be doing?

Mr. RULE. I think there are two things to say, Senator Simon. One, and perhaps the most important, is that antitrust is an area where the laws and the rules are shaped by the judiciary, and whether or not the Reagan Administration had taken office in 1981, I think the changes that you are seeing would have taken place anyway.

The major case, the most significant landmark, if you will, in the change in the law took place in 1977 in a case called *GTE Sylvania.* During that time, and actually previous to it, the merger law—the courts had become more sympathetic to possible defenses and recognized that all mergers do not harm competition.

So the law has been changing. It has been changing because of what the courts have done, not really so much what we have done. We have obviously taken leadership and, in fact, applaud much of the development of the law, but it is something that was happening in the third branch, really, more than the second branch.

The second thing that I guess I would point out is, you know, I have heard a lot of lawyers say that and, frankly, I do not think a good reason for maintaining antitrust enforcement is to keep lawyers employed, and I do not understand your question to say that.

But I get a lot of lawyers who come in—I had a lot of lawyers on four mergers come in over the last 6 weeks and tell me I was crazy and the Department was crazy for bringing these cases.

But, frankly, what we have tried to keep our eye on is the ball, and that is consumer welfare, and if a merger does not harm consumer welfare, which the court has established as the standard, we cannot go in and stop it. If we tried to go in and stop it, we would lose and, in fact, we have lost two cases that we brought in this Administration because the court said that we were being too rigid in our approach to mergers.

But where there is harm to consumer welfare, we will go in, and if the facts simply do not justify the defenses that the parties bring in, we will stop the merger. In several of the cases where we indicated we would challenge a proposed merger, the parties decided they would drop it rather than meet us in court.

But there is still plenty of work out there, it seems to me, for antitrust lawyers, and as I say, there are many companies who think that we are not sufficiently sympathetic to many of their defenses.

Senator SIMON. I do not want to be misunderstood. I am not trying to create jobs for antitrust lawyers.

Mr. RULE. Right.

Senator SIMON. But I am concerned, and maybe this is a defect in the law where what you are talking about is only harm to the consumer. There are a great many of us who believe—and I think this is, I believe, a majority in Congress and I think a majority in the business community—that corporate America is much too much involved in the short-range picture and not nearly enough involved in the long-range picture.

And one of the major reasons now is they are worrying about somebody coming and taking them over; that you have to be looking over your shoulder all the time instead of looking at what you ought to be doing 10 years or 20 years from now.

When you in your testimony say things have to be unambiguously harmful before you can move in, you are talking about the consumer, I assume. Should we strengthen the law by saying we think that the whole question of corporate mergers and hostile takeovers has to be looked at by your Division more carefully?

Mr. RULE. Two things. Just to clarify something, when I say unambiguously bad in my testimony, there I am talking about those cases where we bring a criminal action, and because of the standards under the criminal law, price fixing and bid-rigging generally have been held unambiguously bad as per se violations.

Mergers are obviously more of a rule of reason type approach and there is some prognostication that goes on, a prediction about what the effect of a merger will be in the future, and that is what we look at when we investigate mergers.

With regard to what ought to be done about corporate takeovers, the Administration has expressed its view there. But whatever one views about this long range/short range problem that you men-

tioned and several others that come up in the guise of corporate takeovers, they are not, as you pointed out, traditional antitrust concerns.

Antitrust concerns, the way the laws are written, and I think rightfully so, focus on competitive effects in specific markets; that is, relationships between competitors and that sort of thing.

I think that is a task that we as lawyers and economists in the Antitrust Division and the FTC, and judges in the third branch, can handle. They are relatively well-understood rules. They do not involve the sort of policy balances that you all engage in every day and they are very fact-specific, and we can handle those.

I am not quite sure that even if one agreed that corporate takeovers were a problem in our society—and I will say for the record that I do not believe they are, but if one were to conclude that they were—it is not clear to me that allowing a bunch of lawyers and economists who have never run businesses to second-guess managers as to whether or not a merger is good or bad would be an improvement. I would never say, and no one has ever said that I know of, that all takeovers are good or even that most takeovers are good, or that you can tell whether any particular one will be good.

The fact is that those people who are willing to bet their money on a particular corporate takeover are much better off to make that judgment than we are as antitrust lawyers and economists.

Senator SIMON. Senator Heflin has another meeting and wishes to submit some questions in writing.

Mr. RULE. Yes, sir.

[Senator Heflin's questions with responses follow:]

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

February 9, 1987

Charles Rule
Acting Assistant Attorney General
Antitrust Division, Department of Justice
10th and Constitution Ave., NW
Washington, D.C. 20535

Dear Mr. Rule:

Please respond to the questions set forth below. Your answers will be included in the hearing record of the Department of Justice authorization hearing for the Antitrust Division held on February 4, 1987.

Questions

On Monday, February 2, 1987 the Department of Justice submitted recommendations to Judge Harold Greene of the D.C. Circuit, in compliance with the 1982 consent decree which ended the antitrust suit brought by the Justice Department against AT&T in 1974, and which became effective January 1, 1984.

1. If the restrictions on the Bell Operating Companies are not lifted as the Department of Justice recommends, what adverse consequences would the American telecommunications consumer likely experience?

2. Has there been a shift in the telecommunications equipment market since 1982 with respect to the type of equipment being purchased and the nature of buyers, particularly the Bell Operating Companies' market position?

3. Have federal regulatory policies been responsive to those changes? Are the current and proposed regulations sufficient to both allow competition in the equipment market and protect the consumer from possible abuses by the Bell Operating Companies?

I appreciate your cooperation.

Sincerely,

Howell Heflin

Howell Heflin

HH/lkk

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

26 MAY 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your letter of March 15, 1987, with which you forwarded questions posed in Senator Heflin's letter of February 9, 1987. Those questions concern the United States' recommendations for changes in the line of business restrictions imposed on the Bell Operating Companies (BOCs) by the modification of final judgment (MFJ or decree) entered in the AT&T case. The questions and my responses are as follows:

Q.1. If the restrictions on the Bell Operating Companies are not lifted as the Department of Justice recommends, what adverse consequences would the American telecommunications consumer likely experience?

A. The MFJ provides that the district court is to remove the decree restrictions on BOC entry into currently prohibited lines of business if there is no substantial possibility that the BOCs will use their monopoly power to impede competition in the markets they seek to enter. We have recommended removal of most of the decree's prohibitions because we are convinced that that standard is satisfied as a result of the procompetitive effects the decree has had, as well as technological, economic, and regulatory developments that have occurred since the decree was entered. We recommend that the decree's prohibition on interexchange services be retained because the BOCs' legally protected local exchange monopolies give them significant ability and incentive to impair competition in interexchange services originating or terminating in their regions. To the extent that a BOC desired to offer interexchange services entirely outside of its region or in areas where legal restraints on local exchange competition were removed, it could apply to the court for a waiver from the decree's prohibition to permit it to offer such service.

We believe that failure to remove the decree restrictions as we have recommended could deprive consumers of the benefits of additional competition, especially in the information services markets. For example, both the FCC and the Department's consultant, Dr. Peter Huber, have found that the information services prohibition limits the efficient provision of new services -- such as voice storage and retrieval and data-base services -- to residential and small business customers. Prohibiting the BOCs from competing in markets in which they do not have the ability to impair competition could deny many Americans the benefits of the information age and threaten to impair our nation's ability to take full advantage of its historic strength in telecommunications technology. Failure to have the most advanced and efficient telecommunications industry would threaten the efficiency and competitiveness of the entire economy.

Q.2. Has there been a shift in the telecommunications equipment market since 1982 with respect to the type of equipment being purchased and the nature of buyers, particularly the Bell Operating Companies' market position?

A. Yes. There have been major changes since 1982 in the BOCs' equipment purchasing and AT&T's position in equipment markets. Before divestiture, AT&T made the purchasing decisions for the entire Bell System, which accounted for some 80 percent of telecommunications equipment purchases in the United States. 1/ The data collected by Dr. Huber show that although AT&T approved some non-Western Electric equipment for purchase by the Bell Operating Companies (e.g., some of Northern Telecom's digital central office switching equipment), virtually all of the equipment purchased by the Bell System companies before divestiture was manufactured by AT&T. 2/

As a result of their divestiture from AT&T, each of the seven independent BOCs now makes its own equipment purchasing decisions. The BOCs have sought equipment from a variety of manufacturers in order to meet their needs and obtain the benefits of competition. While exact figures are difficult to obtain, Dr. Huber's report indicates, for example, that AT&T accounts for less than 50 percent of the sales of transmission equipment and central office equipment, and that it accounts

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1/ P. Huber, The Geodesic Network: 1987 Report on Competition in the Telephone Industry 1.15.

2/ Id. at 14.4-14.5.

for only 20 to 23 percent of the sales of private branch exchanges (PBXs). 3/ We anticipate that competitive trends in the equipment markets will continue -- and indeed could accelerate -- if the BOCs are permitted to manufacture equipment. No BOC could dominate the national market as AT&T once did, and the BOCs could stimulate further price and quality competition in equipment markets.

Q.3. Have federal regulatory policies been responsive to those changes? Are the current and proposed regulations sufficient to both allow competition in the equipment market and protect the consumer from possible abuses by the Bell Operating Companies?

A. Generally yes. The Federal Communications Commission has taken an active role in promoting competition in customer premises equipment ("CPE") (e.g., telephone handsets and PBXs) and telecommunications equipment. Even before divestiture, the FCC deregulated CPE, and it has imposed a variety of safeguards -- first structural separation and, more recently, nondiscrimination rules and accounting separation -- to ensure that pre-divestiture AT&T and the post-divestiture independent BOCs would not abuse their power in local exchange markets to impede competition in equipment markets.

In the three years since divestiture, the FCC's policies have further stimulated and protected competition in markets for various types of CPE, which the current decree allows the BOCs to market but not to manufacture. The FCC's comments on the United States' MFJ recommendations state that many of the existing regulatory safeguards also would apply to BOC manufacturing of central office equipment if the decree restrictions were removed, and that the FCC would adopt other regulatory controls as necessary to reduce the risk of conduct that could impair competition. In addition, state regulatory agencies carefully scrutinize all equipment purchases by the BOCs to ensure that the BOCs' equipment purchases will not result in unreasonably high costs to ratepayers.

In sum, as we stated to the district court, we believe that the potential for conduct by the BOCs that could have an anticompetitive effect in equipment markets has been substantially reduced, in part because of regulatory changes that have been implemented since the decree was entered. In these circumstances, it is appropriate to rely on regulatory

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3/ Id. at 15.4 table M.2 (transmission equipment); 14.7 table CO.4 (central office switches); 16.4 table PX.4 (PBXs).

safeguards rather than judicial injunctive prohibitions to protect competition and consumer welfare.

I trust this information will be of assistance to the Committee and I appreciate this opportunity to provide it for the record.

Sincerely,

Charles F. Rule
Acting Assistant Attorney General

Senator SIMON. Let me talk about a few possible changes in the law that are under consideration. One is to provide a 30-day waiting period instead of the present 15-day waiting period.

Does that strike you as something that would be—and I realize you are not in a position to speak for the Administration right now, but just off the top of your head, on the basis of what you have seen, is this a sensible move?

Mr. RULE. Well, our experience under the Hart-Scott-Rodino Act is—I want to say first off that the Hart-Scott-Rodino Act, at least from my perspective, is a very important law and a very good law because it tremendously helps antitrust enforcement.

But our experience is that the current time deadlines in the act are adequate for us to do our job. If there is a problem, for example, where you have a cash tender offer and we have been unable to reach a conclusion in 15 days, we do not hesitate to send out a second request letter.

And, frankly, if the facts indicated to us after sending out a request for additional information, a second request letter, and the subsequent time period that has elapsed indicates that there is a problem, we tell the folks that there is a problem and we will go into court and file for a TRO, a temporary restraining order, to prevent the consummation of the merger.

Senator SIMON. How often, if I may ask, has that happened?

Mr. RULE. Well, generally, when we tell people we are going to do that, one of two things will happen. Either they will say, okay, well, we will just put off consummation of the merger because we think we can convince you over time that there really is not a problem and we will give you the additional information.

I do not recall a situation where we have asked for time, off the top of my head, where we have not gotten it, but I would have to get back to you on that.

The other thing that may happen, after we have gotten additional time, and the parties, well, you know, you have had enough time, we are going to go ahead and consummate—most of the time when we tell them, well, we will see you in court, the tendency is for the parties to back off.

Now, we have not always been that successful. We have had a couple of cases where the parties went ahead with the merger and we lost in court. There is a case, *U.S.* v. *Calmor Inc., and Realex Corp.,* where the court said that we were insufficiently sensitive to ease of entry in that case and the court decided against us.

But, generally, we have been pretty successful in investigating mergers and there are none that come to my mind where we did not have adequate time to investigate the merger because of the Hart-Scott-Rodino time limits.

Senator SIMON. What about—and then I will yield to Senator Thurmond—what about the proposal to apply Hart-Scott-Rodino to partnerships?

Mr. RULE. As you point out, I really cannot at this point speak for the Administration, but it is a problem that both we and the FTC are aware of. It is a problem that I believe, and I think those at the FTC would agree with me, can be solved through a change in the Hart-Scott-Rodino regulations.

I hope that we will be able to address the problem with regulations in a way that will eliminate the need for any additional legislation. I think it can be taken care of under the current statute. I think it should be taken care of, and I believe it will be taken care of in the near future.

Senator SIMON. And you believe the current statute is really broad enough to cover that and you can, through regulation, take care of it?

Mr. RULE. Right, yes, sir.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman. I am in two other committees, Mr. Chairman, so I am glad to be here for a while.

Today, the committee is holding a hearing on the budget authorization of the Antitrust Division, and I would like to commend the Division for the substantial work it has done in recent years.

The attorneys and other personnel in the Antitrust Division have worked very hard and produced substantial results in the areas of price-fixing, merger screening and enforcement, and regulated industries, including telecommunications and railroads.

The Antitrust Division has been very active and successful in prosecuting price-fixers who deprive consumers and the government of the benefits of free competition. These price-fixers have been found in the road paving, electrical contracting, and movie distribution businesses, among others.

There are, no doubt, such criminals in other lines of business, and the Antitrust Division should, and will, seek them out and prosecute them. The successful prosecution and punishment of price-fixers sends a forceful and effective message to others who would engage in such anti-competitive conduct.

The Antitrust Division has screened and studied an enormous number of filings by companies announcing merger plans. The Division has filed or threatened to file a substantial number of cases against anti-competitive mergers in recent months and its success rate is commendable.

In addition, the Division has devoted substantial effort to merger law enforcement as it applies to the railroad industry, pointing out the anti-competitive aspects of several large railroad merger proposals, including the proposed Conrail sale.

The Division's work to increase and preserve competition in regulated industries, such as telecommunications, and deregulated industries, such as airlines, is well known and should be commended.

The Antitrust Division has made good use of its resources and has preserved competition in many areas of commerce. Economic learning has advanced substantially in recent years, and it should be kept in mind that the Antitrust Division uses that new learning, plus traditional wisdom and experience, to achieve what is best for consumers.

I look forward to hearing from the very able acting head of the Division, Mr. Rule, who has appeared before us many times in the last 2 years.

Mr. Rule, I want to welcome you back, and I also want to commend the division for its recent success in prosecuting price fixers and bid-riggers. In your planning, do you anticipate finding equal

numbers of additional price fixers, and if so, are your resources adequate to prosecute them?

Mr. RULE. Yes, sir. Before I answer that question, I want to thank you for those kind words, and it is good to see you again. And I also will pass those words on to our career staff because they deserve a great deal of the credit for the tremendous work they have done, and we are asking a lot of them in terms of the budget cut, but I think that is appropriate.

But I believe we have got the finest group of antitrust lawyers not only in Washington, but in the country, and I think they can do the job.

With regard to the question, we do anticipate being—in fact, I expect that we will bring more price fixing cases this year than we have in the last 2 years. Price fixing prosecution is the most important thing we do.

We have increased the number of grand juries we are involved in. I think we have increased our efficiency and our ability to handle and prosecute price fixing matters. We have engaged in some new initiatives that I think will generate some new cases in new areas. Soft drinks happens to be one; bid-rigging among moving and storage companies with regard to bids on defense installations, and a number of other areas.

So we do anticipate that we are going to be able to handle it. I think we are going to be able to handle it better because of the reorganization that recently has occurred in the Antitrust Division, consolidating people in Washington, moving them all in one building—that gives us greater management flexibility—the fact that we are further down the learning curve in terms of dealing with these cases than we have been in the past, and finally because we have made a strong commitment to the field offices that we are going to maintain their strength and because they are getting better all the time at doing the work of prosecuting and sticking price fixers in jail.

Senator THURMOND. Mr. Rule, in the area of merger law enforcement, I see that you have filed a substantial number of cases recently. How would you assess the Division's success rate in recent merger cases, and are you usually able to obtain divestiture as a remedy?

Mr. RULE. Yes, sir, I think we have been very successful. Our Guidelines, I believe, now track the current state of the law. Parties know when they come in to us that they will get a fair hearing in terms of whether or not their merger violates the antitrust laws.

And if we conclude that it will violate the antitrust laws, generally the individuals know that we are likely to be able to establish that in court. Occasionally, we have had to go to court, but we generally win, although we have lost a few cases in this Administration.

And I am very confident that the divestitures we have been able to obtain in those cases where the parties decide, hey, let us try to settle your problem so we can carry forward with the rest of the merger, have been adequate to deal with the problem, to create an independent competitor after the merger.

And so I am happy with the tools we have and happy with our ability to use those tools to eliminate the anticompetitive effects of mergers.

Senator THURMOND. Thank you, Mr. Chairman.

Senator SIMON. Thank you, Senator Thurmond.

On my previous question on Hart-Scott-Rodino on partnerships, how soon could we be hearing from you as to what you are going to propose in the way of new regulation?

Mr. RULE. I wish I could give you a specific time, but it involves coordination between the FTC and the Department of Justice, and the FTC is actually the one that officially administers the regulations, but we are involved.

All I can simply say is that a change to close the so-called partnership loophole is in the works and I would hope that you hear something publicly on that in the very, very near future.

Senator SIMON. But, say, within 30 days or 60 days?

Mr. RULE. I would say that is a reasonable estimate, but I just cannot commit because I cannot commit the FTC to any specific time period.

Senator SIMON. I would add that Senator Metzenbaum chairs the Antitrust Subcommittee, and my feeling is he wants to see some movement in this area and as soon as we can hear from you, that would be very helpful.

Let me add one other just kind of feel I get as I listen to you testify, and that is the primary concern is in the price-fixing area, and traditionally that has been the major concern.

I think there is another concern today, and that is, if I can just use one illustration, when U.S. Steel buys Marathon Oil and we have a steel plant in this country that is, for the most part, really outdated and needs to be modernized, we end up without a new, modernized steel plant; we end up not digging another oil well. We use up $6.5 billion of capital reserves in this country.

And, yet, that at this point is not something you look at, is that correct?

Mr. RULE. That is correct, and the reason we do not is because that is not what the antitrust laws require us or, you know, are all about. I mean, if we went in, and assuming we were to agree with the policy premises and tried to—or someone tried to stop a merger on that basis, there simply would be no precedent and I think it would very quickly be thrown out, given the current state of the statutes.

Again, I mean, at some point, and I am sure over a period of time, I and others in the Administration will have an opportunity to discuss this subject, but frankly I think, if anything, we need to make the merger law clearer that its purpose is limited to consumer welfare and dangers of increasing market power because of my concern with government bureaucrats or lawyers, people in the Antitrust Division who are extremely competent at the job they do, being asked to do a job that I think they are not going to do as well as the individual parties who are out there in the merger market betting their own money.

I think, if anything, we would make the situation much worse, but I do not think it is nearly as bad as some believe.

Senator SIMON. Well, it is not good in terms of capital resources.

Let me just mention a bill I had back when I was a member of the House. I had a bill in that said any corporation with assets of greater than $1 billion simply could not acquire another corporation, so that their money would be put into research, development, plant expansion, the kinds of things that America ought to be about.

Since the criteria is very clear, it really should not involve a lot of work for anybody and it would be a clear signal to corporate America, you worry about not gobbling up other companies; you worry about expanding.

Does that make sense to you?

Mr. RULE. Well, obviously, it would not be a difficult rule to administer, although the way lawyers are, we always find little ways to get around things and you are always constantly dealing with that problem.

But I think the real problem with a statute like that and one of the things that one would have to consider are the costs of it because, really, what mergers and acquisitions involve is the movement of assets. When you see a merger or an acquisition of assets occur, what it involves is one party saying I think I can take those assets that another party has and I can make them more valuable in my hands than they are in that party's hands, and as a result there is a transaction and they move.

And that sort of judgment that that is the best place for me as a party out there betting my money in the free market systems to put my money—that is how I am going to make the most profit—is generally what has fueled this economy's growth in the past, what has made this a strong and dynamic economy.

And I guess I would just say that I hope before any changes are made that are fundamental of any sort in the economy that we are very careful that we do not harm the engine that really has driven this machine that historically has been such a success.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

In response to Senator Simon's question, you say that you do not know exactly how long it will take to change the merger rule on partnerships. Maybe you could explain the procedures that you have go through to make such a rule change and the time period required. I thought you might elaborate a little bit on that.

Mr. RULE. Sure. What we have to do—this would involve a change in regulations, and so what we have to do, and again it is the FTC that will ultimately put out the proposed rule, but we would be involved in concurring in it.

A notice of proposed rulemaking would have to go out; comments would be solicited based on that notice of proposed rulemaking. Those comments would be considered and then a final rule would be proposed and promulgated, and then it would go into effect.

And I am not an expert on the APA and I can provide that information to you, Senator, but it probably is 60 days, and I am just not sure of what the time periods are, but we can provide that information to the committee.

Senator THURMOND. Thank you, Mr. Chairman.

Senator SIMON. Senator Humphrey.

Senator HUMPHREY. No questions, but I do have a statement for the record.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR GORDON J. HUMPHREY

I look forward to considering the administration's proposals for antitrust reform legislation, which I assume will be arriving in some form in the near future.

Sound and creative antitrust reforms can make an important contribution to the President's broader efforts to enhance the competitiveness of American enterprise in international markets. While we must continue to prohibit monopolistic and predatory business practices and prosecute those who engage in them, we must also work to eliminate rigid and outdated antitrust doctrines and remedies which often suppress healthy competition and innovation.

I believe there is considerable bipartisan support for these basic principles, and I hope that this Congress will be able to work effectively with the Department in achieving reforms which put those principles into practice.

Senator SIMON. I have several questions that Senator Biden will submit, but let me ask two of the questions here.

At the end of last year—this is Senator Biden's question—at the end of last year, you announced that the Antitrust Division was overwhelmed with work from the increased number of Hart-Scott-Rodino premerger notification filings and it was going to be necessary to transfer the initial screenings of proposed mergers from the Division's attorneys to economists. You later indicated this was only a temporary situation.

How is this consistent with cuts of 100 positions from the Antitrust Division?

Mr. RULE. I think that is a good question. What happened at the end of last year was a true anomaly in terms of a spurt in merger activity. As I pointed out, I think in October and November we had something like 1,300 merger filings, whereas in the previous 2 months, which were by historical standards very high, we had only about 500 to 600.

So that means that the number of mergers that we saw at the end of last year increased about twofold to threefold. It was just an unusual spurt in activity. I think it was due—I believe firmly it was due to the change in the tax law. Everything that we have seen before and after indicates that.

So to try to base resource budget decisions on that 2-month anomaly, I think, would be misleading because we are not likely to see it any time soon, if ever, again. There was a great deal of, I think, confusion about what we did in order to take care of that temporary spurt.

But most of those merger filings came in in October and November. As a result of that, we had a number of ongoing investigations looking at those mergers that raised competitive problems.

We wanted to make sure that our attorneys did a thorough job in investigating those mergers; they wanted to make sure. They came with a proposal that with regard to those filings that came in in December when the number had slackened off a little bit to have the economists screen them in the first instance, based on criteria that were agreed to by the economists and the lawyers, that would cull out those merger filings that raised no competitive concern at all and identify the others that raised even colorable antitrust problems so that we could focus our resources and attention on

those and free up our lawyers from some paperwork to focus on the more important investigations.

As of January 1, I guess, or certainly the first of this year, we have returned to the normal practice of both economists and lawyers reviewing merger filings. We see no real problem with that, given the historically normal rate of merger filings that we now have.

And so I do not think anything can be taken from what happened at the end of the year, and I think it would be a bad idea to make budget decisions on the basis of it because it is so anomalous.

Senator SIMON. And if what happened was not because of the tax law and you see that trend continuing, you will be back requesting additional personnel?

Mr. RULE. Yes, we will. One of the things that I think the Attorney General mentioned today but that should be kept in mind about putting us in the line-item general litigation activities—one of the things that that enables the Attorney General to do is to have more flexibility to give us more resources, if that is necessary, in terms of dealing with—if I am wrong about this being tax-driven, to be able to respond to that situation, to give us more flexibility.

Senator SIMON. We will adjourn the hearing now. I would add that Senator Metzenbaum is going to have a series of hearings in the whole antitrust area. He is very concerned; I happen to share that concern in this area. I am sure we will be visiting with you again on this.

We appreciate you being here today, and the hearing stands adjourned.

Mr. RULE. Thank you, Senator Simon.

[Whereupon, at 3:52 p.m., the committee was adjourned.]

AUTHORIZATION LEGISLATION AND OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

(Civil Division)

THURSDAY, FEBRUARY 19, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:35 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph Biden (chairman of the committee) presiding.

Also present: Senators Heflin, Hatch, Grassley and Humphrey.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN [presiding]. I welcome you to this hearing on the oversight of the authorization request of the Civil Division of the Department of Justice.

As the chairman of the Subcommittee on Courts and Administrative Practice, I hope to have the opportunity to work closely with you concerning issues that impact upon both our jurisdictions.

The Civil Division serves as the law firm for the government, and the record you have amassed in recoveries for the United States Government is an impressive one. Your testimony indicates that in 1986 the attorneys of the Civil Division defeated more than 98 percent of the monetary claims brought against the United States, saving the Treasury nearly $7 billion.

From a purely fiscal standpoint, that is remarkable. But our purpose today is to become more familiar with the priorities of the Civil Division and to ascertain how the litigation record impacts upon individual lives and the cause of justice.

I look forward to your testimony, and I will have a few questions after you complete your statement.

STATEMENT OF RICHARD K. WILLARD, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. WILLARD. Thank you, Mr. Chairman. It is a pleasure to be here. If it is acceptable with you, I would like to have my prepared statement submitted for the record and just give a brief summary this morning.

Senator HEFLIN. Without objection, it is so ordered.

[Prepared statement of Mr. Willard follows:]

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to be here today to discuss the Civil Division's budget.

The Civil Division represents the government and its officials in a variety of civil suits including subjects as broad and diverse as the government itself. Our litigation is largely defensive -- responding to mounting claims seeking billions of dollars from the Treasury and challenging key government programs. We also initiate litigation to enforce programs vital to the national interest and to recover millions of dollars owed to the government.

The Division's lawyers personally handle only the most significant of these cases -- those involving issues which are nationwide in scope, those in specialized courts such as the Claims Court and those with major policy implications or potential cost to the Treasury. U.S. Attorneys litigate the remaining cases, frequently with the benefit of extensive advice from our attorneys.

Enactment of immigration reform and new measures to penalize and deter fraud against the government made it necessary for the Division to seek a supplemental appropriation for 1987. Thirty-four new positions and $1,576,000 in 1987 will make it possible for us to defend and vigorously implement these new laws in a timely manner. For 1988 we have requested further increases of 114 positions and $13,579,000. These 1988 increases will enable us to continue our support of immigration reform and the anti-fraud initiatives, preserve our ability to protect the Treasury

against billions in unwarranted claims and protect other vital federal programs.

Impact of Recent Legislation

Since 1983, the Division has been responsible for civil litigation involving the laws that control our borders. Passage of the *Immigration Reform and Control Act of 1986* will dramatically affect our activities through the remainder of this decade. Class action challenges to immigration reform itself are but the first wave of litigation we face. Two major class actions have been filed already and a third is imminent.

In addition to class challenges to the new laws, a deluge of individual suits and petitions for review seeking relief under the various provisions of the Act is beginning to materialize. Between 1986 and 1988, pending immigration courts of appeals cases are expected to rise 53 percent and pending immigration trial cases are excepted to increase by 39 percent. To avoid the possible failure of the entire immigration reform initiative which took years to develop, approval of our 1987 supplemental increase of 13 positions and an additional $936,000 is essential. Included in our 1988 request is a further increase of 13 positions and $2,096,000 to handle the future growth in immigration litigation.

Last year, as you will recall, Congress took major strides in the Government's war against fraud, waste and abuse by enacting the *False Claims Reform Act*, the *Program Fraud Civil Remedies Act*, and the *Anti-Kickback Enforcement Act*. The Civil Division was pleased to work closely with this Committee in the development and passage of these important laws which increase substantially the potential for recovery of defrauded funds and will serve as a strong deterrent against future fraud.

The Division has already taken a number of significant actions to implement these new laws. Where applicable, we have

informed the courts of the provisions of the *False Claims Reform Act* and asked that they be applied in pending cases. Working with a committee of agency Inspectors General, we have made significant progress in the drafting of proposed model regulations to implement the *Program Fraud Civil Remedies Act* and expect to issue them in the near future.

Effective implementation of these new laws will add substantially to the workload of our attorneys. An immediate infusion of resources is needed if Congress' intent is to be realized. A 1987 supplemental increase of 21 positions and $640,000 is required to meet these added litigation and investigation demands. And a further increase of $350,000 is needed in 1988 to comply with the stringent record-keeping and document custody requirements of the new laws.

Overall Caseload Growth

The Civil Division's enforcement of the new immigration reform and anti-fraud laws are an important part of our overall responsibility to enforce Federal policies and laws and to protect the Treasury from unwarranted claims. As American society has become increasingly litigious, the Division's workload swells. No easing of this trend is expected over the next two years. By 1988 we expect that our overall pending caseload will increase to more than 25,000 cases and the dollars at issue in our cases will reach $288 billion. These pressures have prompted our request for 1988 budget increases in a number of other areas, which I will summarize for each of our major organizational components.

Commercial Litigation Branch

Few areas of civil litigation more clearly affect Federal budgetary issues than commercial law and government contracting. Over the last ten years, the government's purchases of private

sector goods and services have grown by nearly 200 percent -- in 1986 alone the federal government spent $367 billion on goods and services. The Civil Division's Commercial Branch plays a critical role in defending the government's interest in a growing number of disputes with its contractors where a strong defense and timely resolution of disputes is crucial for efficient awarding and performance of contracted services.

Similarly, the Commercial Branch initiates cases asserting the government's creditor rights in loan defaults and bankruptcies. For example, we represented the Economic Development Administration in the bankruptcy proceedings of its steel company borrowers such as LTV. In the utilities field, we continue to expand our representation of the Rural Electrification Administration interest in litigation including over $3 billion in defaulted loans. We also continue to represent the Bonneville Power Administration in the massive $7 billion Washington Public Power Supply System (WPPSS) bond default litigation.

Commercial attorneys also handle all cases against the government in the Court of International Trade, and more than half of the cases in the Claims Court and the Court of Appeals for the Federal Circuit. These areas continue to be high-growth, with substantial policy and economic implications.

Finally, we continue to place great importance on the task of collecting debts owed to the United States as a result of defaulted loans, settlements or judgments, and other court-imposed obligations. While the U.S. Attorneys handle the great bulk of the debt collection litigation, our Commercial Branch plays a leading role in handling major cases as well as in coordinating collection matters. The Civil Division's commitment to debt collection has paid off handsomely -- over $378 million in cash has been deposited in the U.S. Treasury by the Civil Division since the effort began in 1981.

We are requesting an increase of $4,142,000 and 29 additional positions to effectively deal with these growing areas of commercial litigation and the growing complexity of these cases.

Included in the Commercial Branch increase is $2,364,000 for Automated Litigation Support (ALS). ALS has shown itself to be the Division's most valuable investment in attorney effectiveness to-date, providing an array of computer and microfilm technologies. It is the only practical means for enabling attorneys to sift through enormous document collections quickly, identifying crucial evidence in cases where billions of dollars are at stake.

Torts Branch

Another responsibility of the Division's in defending tax dollars is in the area of tort claims against the government. As I have discussed with the Committee previously, the country is experiencing an explosion in tort liability litigation. Increasingly, the courts have shown a tendency to compensate plaintiffs at the expense of the defendant considered most able to pay regardless of established fault or proof of causation. There is an apparent assumption that liability costs can readily be covered by "deep pocket" defendants or their insurance companies.

Clearly, the Federal government is the ultimate "deep pocket" for tort plaintiffs. Only $514 million were at issue in the cases we handled twenty years ago -- a mere one-half of one percent of the $97.5 billion at stake in the tort cases we are litigating today.

The torts explosion has and will continue to dramatically affect the Federal treasury. By 1988 we expect our caseload to increase to more than 6,100 cases, with claims against the Treasury aggregating to $192 billion. This growth is occurring across the board including aviation accident claims, medical malpractice suits, and the entire spectrum of government

activity, including law enforcement, regulatory actions, contract disputes and prisoner claims.

For Torts litigation, we are requesting an additional $3,953,000 and 20 positions. Of these funds, $2.1 million is required for Automated Litigation Support (ALS). This added ALS funding is essential to process nearly 300 million pages of evidence associated with the massive asbestos litigation which involves over $18 billion in claims against the government. A number of major asbestos cases are scheduled for trial this spring and summer and our successful defense is highly dependent upon completing the screening and computerization of this evidentiary collection.

Federal Programs Branch

Another area of increased litigation defended by the Civil Division involves challenges to acts of Congress and their implementing regulations. With increasing frequency, litigants are attempting to carry the debate over policy into the courtrooms, rather than allowing it to remain in the Legislative and Executive Branches, where it belongs. If these suits are not defended successfully, the impact on government operations and effectiveness would be enormous.

For instance, in Nuclear Pacific v. Department of Commerce, a plaintiff challenged the Commerce Department's denial of a license to export nuclear plant components. Our victory in this litigation protected the government's export license procedures in the crucial area of nonproliferation. While such a victory cannot be measured in monetary terms, its importance to the United States is of the highest magnitude. In another victory, Railway Labor Executives Assn. v. Dole, we successfully defended regulations of the Federal Railway Administration aimed at protecting public health and safety by controlling alcohol and drug abuse by operators of the nation's railroads. The Supreme Court vacated a stay, granted by the Ninth Circuit, permitting

these much needed rules to go into effect. The importance of such victories in terms of safety and the ability to implement public policy is immeasurable. In NTEU v. Reagan, the Division is currently defending important litigation challenging the President's Executive Order for mandatory drug-testing for federal employees.

These are but a few examples of the defensive caseload of the Federal Programs Branch that will nearly double between 1986 and 1988.

In addition to the growing defensive litigation caseload, the Federal Programs Branch also undertakes certain select enforcement cases. For instance, we were recently involved in a year-long trial seeking the recall of 1.1 million "X-Cars" and the assessment of over $4 million in civil penalties against General Motors. Other examples of affirmative litigation cases were those brought on behalf of the Department of Labor and union members against certain fiduciaries and health care providers for breach of fiduciaries duties and excessive costs in running the union dental plans.

While direct monetary claims are not a primary issue in most Federal Programs cases, the dollars at stake could exceed $10 billion dollars by 1988. In addition, much of Federal Programs litigation involves challenges to restrictive statutory provisions and regulations of the agencies implementing Federal entitlement programs. They most often seek to broaden the base of eligible beneficiaries. While it is difficult to calculate the cost, agencies administering these programs estimate them to be in the billions of dollars over the lives of the entitlement programs.

In order to preserve the Division's ability to adequately defend programs vital to the economy and important government operations, we have requested an increase of 20 positions and $1,413,000 for the Federal Programs Branch.

Appellate Staff

Finally Mr. Chairman, the Civil Division's role in upholding Congress' laws and protecting the taxpayer's dollars from unwarranted claims does not end in the trial courts. The Civil Division has a specialized appellate staff of attorneys who defend the interests of the United States in cases challenging trial court and agency administrative decisions in favor of the United States and who seek to reverse decisions against the government. Our appellate staff has sustained a remarkable rate of success, winning approximately 83 percent of the appeals cases they handle -- a class of cases involving the most sensitive and difficult legal issues. In the last arena for the defense of government interests, our attorneys also assist the Office of the Solicitor General in litigation before the Supreme Court.

In large part because of increased district court litigation and agency administrative adjudications, we are experiencing an unprecedented increase of appellate litigation. The number of appellate actions for which the Division is responsible has increased by over 80 percent in the last five years. By 1988 new cases and petitions filed in the Supreme Court are expected to increase further by more than 50 percent over 1986. At the courts of appeals level, we expect a further increase of at least 20 percent over the same two year period.

These increases, coupled with the obvious precedential importance of appellate litigation, make it necessary to request an increase of 32 positions and $2,331,000 so that we can assure our current success rate. Without these increases, the Division will be forced to delegate almost 3,000 defensive appellate cases, primarily to the attorneys with our client agencies who generally lack litigation experience. The result would be the unacceptable diffusion of appeals litigation, a lower appellate success rate, and no real savings in personnel costs to the government as a whole. Moreover, this dispersion of litigating authority all to often results in similar cases producing

different results. Subsequent efforts to reconcile these kinds of cases further taxes our litigation resources and places an additional burden on the Federal judiciary at higher appellate levels.

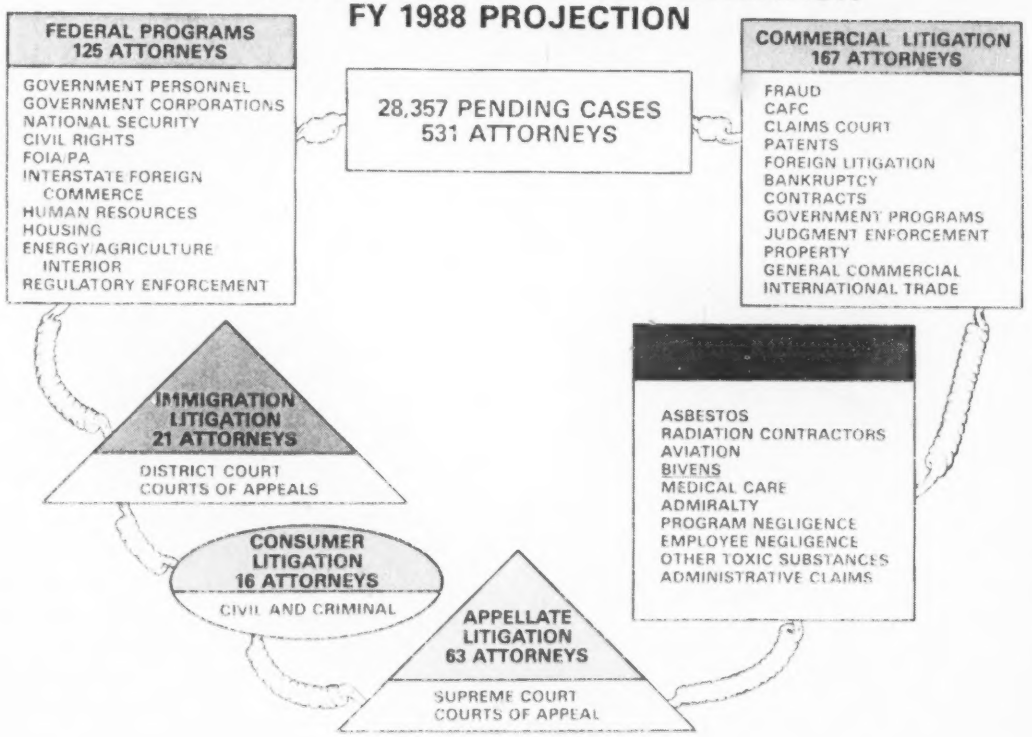
Conclusion

In summary, I cannot stress enough the unrelenting growth in our caseload and its growing importance to the Treasury. In order to keep pace with these suits, we have made numerous efforts to enhance the efficiency of our attorneys. Investing in technology has greatly improved the productivity of our workforce. Our integrated office automation system provides our attorneys the tools they need to efficiently and effectively conduct legal research and create the numerous legal documents needed for court filings. We have succeeded in bolstering our attorneys' effectiveness through our ALS program. The program provides an economical approach to acquiring and handling massive volumes of discovery, evidentiary and transcript documents critical to the successful outcome of complex litigation. It has played a pivotal role in major litigation such as asbestos, WPPSS and General Motors. Keeping pace with innovative approaches to office automation and litigation support will continue to enhance our ability to protect government programs and the Treasury from unwarranted claims.

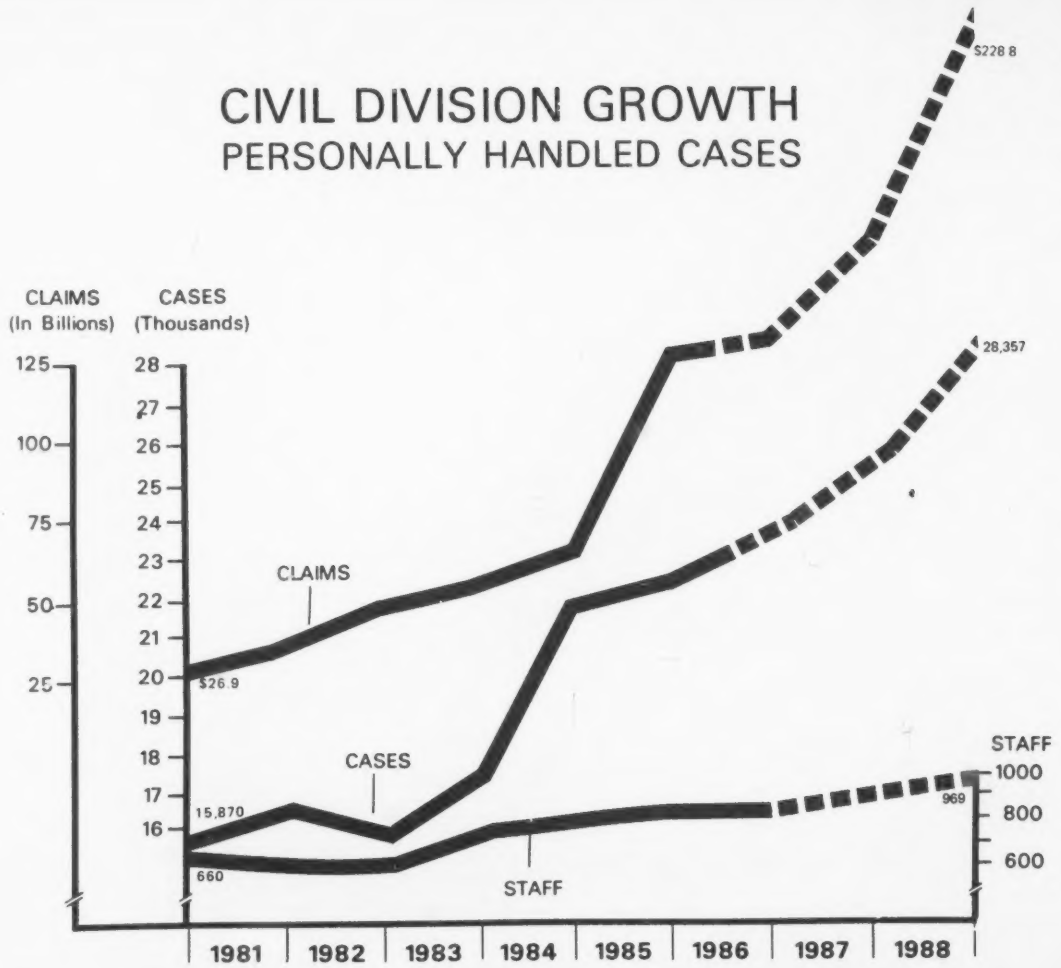
Our record of success is an excellent one. In 1986, our attorneys defeated more than 98 percent of the monetary claims brought against the United States saving the Treasury nearly $7 billion dollars. At the same time our attorneys obtained judgments for the government totaling $73 million. For each dollar spent during 1986 on defensive litigation, we defeated $121 in claims. For each dollar spent during 1986 on affirmative litigation, we secured favorable judgments of $6. These bottom lines attest to the high quality of our efforts and the value of continued investment in the Civil Division's activities.

Mr. Chairman, I would be glad to answer any questions you or members of the Committee may have.

DIVERSITY OF CIVIL DIVISION LITIGATION
FY 1988 PROJECTION

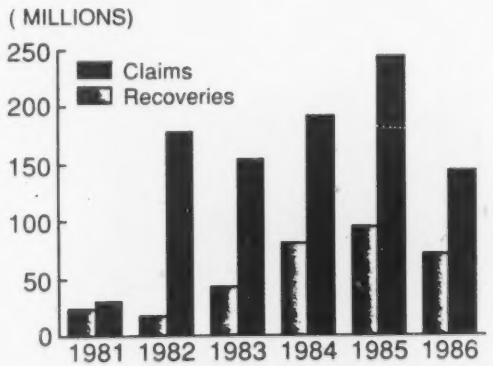


CIVIL DIVISION GROWTH
PERSONALLY HANDLED CASES



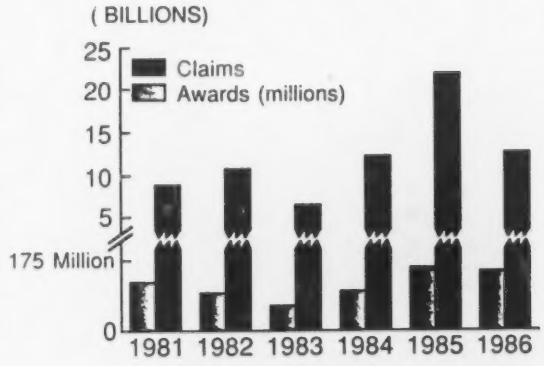
CIVIL DIVISION MONEY CASES
COMPARISON OF CLAIMS AND AWARDS
CASES CLOSED 1981 - 1986

GOVERNMENT AS PLAINTIFF
CLAIMS/RECOVERIES



1981 - 1986	
TOTAL CLAIMS	$1,361,894,639
TOTAL RECOVERIES	$330,360,720
RECOVERIES PERCENTAGE 24%	

GOVERNMENT AS DEFENDANT
CLAIMS/AWARDS



1981 - 1986	
TOTAL CLAIMS	$74,109,689,880
TOTAL AWARDS	$682,494,047
AWARDS PERCENTAGE .9%	

Mr. WILLARD. I brought along three charts which may help explain a little bit about the Civil Division. I would like to start by saying I appreciate the opportunity to appear today since this is the first time I have had a chance to appear before the Senate Judiciary Committee at an oversight hearing. The first chart we have is sort of a "wiring division" of the Civil Division and illustrates how the Division is broken up.

We have three major branches in the Civil Division. The Federal Programs Branch, the Commercial Litigation Branch and Torts Litigation Branch. These three branches handle the litigation in their respective areas.

I don't know, Mr. Chairman, if the chairman wants to make a statement.

The CHAIRMAN. I apologize for the interruption.

Mr. WILLARD. I just got started if you would like to interrupt for your statement.

The CHAIRMAN. You are not obliged to do that. I would like to welcome you. I am always interested in what you have to say. We tend to disagree on occasion, but hopefully we can work together to solve some of the dilemmas that exist.

Mr. WILLARD. Thank you, Mr. Chairman.

The wiring diagram that is up here shows the structure of the Civil Division and what we do. I would say the three main branches respond to three major areas of law: contract law, commercial law, and tort law. In addition to these branches, we also have three specialized offices: the Immigration Litigation Office, the Consumer Litigation Office, and our appellate staff that coordinates work in the Court of Appeals and also helps support the Solicitor General in Supreme Court work.

The next chart summarizes the nature of the dilemma we have faced in the Civil Division over this last 5 years. As you can see, there has been a constant escalation in the number of cases we had to handle and a much smaller number of people, lawyers and support personnel to handle those cases. Approximately 90 percent of our caseload is defensive, initiated by people who sue the government. We don't have much choice about having to show up to handle those cases. Unlike most government agencies, we don't have a lot of discretion about what we are going to do.

The chart shows that the number of cases has grown significantly as has the money involved. Our staff has grown somewhat but we are asking for additional resources in our supplemental fiscal year 1987, as well as our budget for 1988 to handle the caseload growth.

The last point I would like to make is that the money spent in the Civil Division is highly cost effective for the taxpayer. As the left side of the chart indicates, in cases where we are a plaintiff suing on behalf of the government, we recover close to 24 percent of the money we seek. Over the last 6-year period, that has been over $330 million that we recovered for the taxpayer in judgments.

The right-hand side of the chart shows that as the defendant, we have defeated enormous amounts of claims against the Treasury. The chart shows are cases that have been closed in each of these fiscal years. In the last 6 years, a total of $74 billion was at stake in lawsuits that were resolved, but the total amount paid out in

judgments and settlements was only $683 million, less than one percent of the amount claimed.

People say money spent at IRS is cost effective to the government and it brings in more than goes out. I think the same is true of money spent on civil litigation. It does help the government compete with claims that are paid and recover money owed to the Treasury.

For those reasons, we are seeking this increase in our appropriations.

I appreciate the opportunity to be here, Mr. Chairman, and I look forward to answering any questions you or any other member of the committee may have.

The CHAIRMAN. Would you put the first chart back, please, to help us in formulating questions?

I do have an opening statement which I will have placed in the record as if read.

[Prepared statement follows:]

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. Willard, I want to welcome you this morning as we begin our oversight of the Civil Division. While the Justice Department's budget request provides the rationale for this series of hearings. It also gives members of this committee the opportunity to question senior Department officials about their specific programs and priorities.

It is no secret that you have been a forceful advocate for sweeping tort reform on a national scale. You headed the interagency tort policy working group that issued a lengthy report last year on tort reform. You have spoken out on the issue, and you have attempted to orient the Department's thinking when it comes to the kinds of tort cases your division handles.

I don't fault you for this, but I do differ with your views. And I believe that you have only focused on one aspect of the liability crisis—tort law reform—to the neglect of a number of other serious issues.

Yesterday, this committee spent several hours exploring what some might deem the ultimate solution to the insurance liability crisis—repeal of the insurance industry's antitrust immunity afforded under the McCarran-Ferguson Act. We certainly were given food for thought, not only about the antitrust issues but about regulation of the industry generally. But today I want to explore with you other aspects of this problem—issues which must be considered if we are to restore the American public's faith in our courts and in our system of civil justice.

I intend to urge my colleagues on this committee to work together to develop a broad-based series of recommendations addressing the liability crisis. Several subcommittees are involved. We need to hold comprehensive hearings and consult the Nation's most reknowned experts. Only then will we be assured that we have crafted long-term, meaningful answers to one of this Nation's most difficult problems.

The CHAIRMAN. I think the case you make for the cost effectiveness of your efforts is accurate. I think the case that you make for your having had to do much more with a much smaller growth rate, and the number of the people to deal with the growth rate and the claimed responsibilities you have, is also accurate.

I would like very much to help accommodate your budget needs. You do not have an unfriendly chairman in that area.

Where the chairman tends to be more unfriendly is in the area of something I would like to move to. I say this with respect and I mean it sincerely: I would like to talk a little bit about your and my differing views on one aspect of what the Civil Division has paid some attention to, and that is the liability crisis and the tort law reform.

I would like to, if I may, start, because of your having been the point person really, with what was a sweeping proposal, one that

was viewed by some as a very significant and worthwhile proposal, even though you and I had differing views.

I would like to go back, if I may, and ask a little bit and talk a little bit about tort reform, if I could.

As you are probably aware, the ABA has recently voted on their report on actually litigation-approved liabilities, and they recently issued a set of recommendations which they view as being able to address the liability crisis. I think it is safe to say the recommendations in their report were far less sweeping than conclusions reached by the admissions tort policy working group that you headed.

My first question really is, are you familiar with the report?

Mr. WILLARD. I got a copy of the report, Mr. Chairman, about a week ago and I have looked through it but I am not closely familiar with all the details.

The CHAIRMAN. I am in the same position as you are. I have had the staff summarize the report for me. I have read portions of the report, but I have not actually read the detailed report myself, nor am I familiar with anything other than the newspaper accounts and the votes taken with regard to the ABA. I understand they voted to approve or disapprove some of the recommendations.

Some of the recommendations that were made, I find intriguing. The essence of their report was that they believed that the tradition of State-fashioned court principles remains fundamentally sound, and then they went on to make certain recommendations.

Let me tick off a few.

First, they recommended modifying the doctrine of joint and several liability to allow defendants to be liable only for the equitable share of the plaintiff's loss.

The second recommendation was awarding punitive damages only where a defendant is guilty of something more than ordinary negligence and raising that standard of proof.

Third is paying only a reasonable portion of the punitive damages, the complaint allocating the remainder for public purposes.

I assume part of that is to deal openly with the award of sympathetic damages. If they are aware it is not going to go all to the plaintiff, it may impact on the thinking.

Fourth is providing full disclosure of continued fee arrangements; judicial modifications of fees found to be plainly excessive would be in order, setting no ceiling on pain and suffering but allowing the courts to intervene to modify verdicts which are excessive or inadequate.

Another recommendation was limiting the scope and duration of discovery in tort cases, increasing sanctions for attorneys fees and procedures.

The last one that caught my eye was establishing a commission to undertake a comprehensive study on the mass tort problem, which we all know has already been done several times.

My question is, would you be willing to comment—I realize your Commission report touched on some of these things—comment for me on your view of the soundness of a State-based tort system which exists now and whether or not these recommendations, in your view, are any more than cosmetic?

As you know, most do not require legislation for us to deal with, which appeals to my conservative friends. Just comment on the report generally.

Mr. WILLARD. I would be happy to, Mr. Chairman.

First of all, I think that many of these reforms deal with areas that our working group dealt with and, as you said, in a somewhat less sweeping way. While they don't go as far as our working group's recommendations, I think they would be for desirable reforms if that is all that can happen.

I would also agree most reforms should be State-based. Our recommendations last year for Federal legislation were in only three areas where we felt there was an overriding Federal interest: products sold nationwide, liability of Federal contractors, and liability of the Federal Government under the Federal Tort Claims Act. Beyond that, we felt the tort law ought to remain State-based and that that was desirable.

With regard to some of the specific proposals, changes in punitive damage standards and calculations would help prevent some of the abuses that have occurred. I am not sure a new verbal formulation will do the trick. In theory, the legal theory for punitive damages for most States is very high.

I think the problem has not been that the standard is wrong but the way it has been applied as presented. So it may need a more mechanical kind of restriction on punitive damages.

I am also skeptical about turning punitive damage awards over to the State. I think it would make punitive awards like civil fines. That should be done by government officials under the authority they already have in many cases rather than being administered through tort litigation. So I am skeptical of that idea.

With regard to preventing frivolous lawsuits and dealing with discovery abuses, everyone agrees that those are problems. It is easy to be against them. It is a little harder to come up with a concrete proposal that will actually work, but I think that is something worth working towards.

The CHAIRMAN. Do you plan on introducing some additional legislation this year?

Mr. WILLARD. The administration does support product liability legislation similar to what was proposed last year. Product liability reform has been proposed as part of the administration's competitive package. In all honesty we are not expecting that that is going to be met with wild approval, given the Congress' reaction last year. For that reason, while we still support it, we are going to take an openminded attitude to see what will happen on it.

The CHAIRMAN. With regard to an openminded attitude, will the Civil Division be examining the ABA recommendations and in the absence of prospects for broad changes as recommended? Will you be responding to or reacting to any of these recommendations?

Mr. WILLARD. Not as a Division. The Tort Policy Working Group of the Domestic Policy Council will be looking at those recommendations and probably will react to them in some way. But I believe that our general view this year is going to be that tort reform ought to come primarily at the State level rather than pushing for Federal legislation in this area.

One reason for this is the encouraging record of what has happened in the last year on the State level. Last year, while we had little success in getting Federal legislation, some 39 States adopted tort reform at the State level. I think that may be some indication that the States have a reform movement that may pay off.

The CHAIRMAN. I would invite you to consider whether you will work with this committee. I will invite the ABA also, probably throughout, to have our own little informal working group to see if there is some progress we can make. Your assertion is correct that it is a problem. There is no question. I feel this can be addressed not only on a bipartisan basis, but also on the basis where we bring in the ABA, maybe you and your division, others of the working group and some of us who are interested on this committee in a very informal way, not a formal hearing, to see if there is a means by which we can work towards some solutions.

The way I have operated here, with Senator Thurmond and I might add with Senators Hatch and Grassley, as much as we disagree, is to sit down and decide where we can agree. If we can put in motion the points we agree on, we usually tend to make some progress. I don't ask you to respond to that now but maybe take it back to the shop and consider it and just do it in a very informal way. Maybe we can have a couple of meetings by which we can accommodate some of these concerns.

I have one last question and then I will yield, but I will have others later. Unless I misheard, as I was leaving to go vote on contra aid, Mr. Rule testifying yesterday, whether he was asked or responded, in essence, what I thought he said was the following. If the McCarran-Ferguson Act were being proposed in the first instance in 1987, he would take that and it would be rejected; that the department would recommend against it. He didn't say they would do that now, and let me make clear I realize the postscript about your conclusion that McCarran-Ferguson has no impact in this area, and these may be separate and discrete questions. If McCarran-Ferguson were being proposed for the first time now, do you think you would be recommending to the department that it support that kind of legislation?

Mr. WILLARD. In terms of the antitrust exemption, the answer is no. My answer is the same as Mr. Rules. If other provisions of McCarran-Ferguson were left open for study, we would be supportive.

The CHAIRMAN. That is what I thought.

Here is another area where you might be able to make some progress. I am not being facetious when I say this. Somewhere between the views expressed by Senator Metzenbaum and those of our forceful and articulate Senator Hatch on McCarran-Ferguson; I don't mind mentioning his view. He has taken a very forceful position, and it seems everyone agrees that the relation of the industry should essentially be State-based. There is also a minimum of doubt across the board as to the utility and soundness of the antitrust examination. So, it seems to me there is not a soft middle but a sound middle ground where we may be able to move to make some sense.

Again, I invite you to consider whether or not you would be willing to sit down with me, and you always have been and I don't

imply by that that you have not. Let's discuss whether or not there is a means by which we can accommodate the debate that is going on around McCarran-Ferguson so maybe we can make some progress in that area. That is by way of invitation. Again, I don't expect a response now but, as you think about it, talk it over with the department, I would appreciate it if you would get back to me if you are willing to sit down informally to discuss this.

Mr. WILLARD. I certainly will, Mr. Chairman.

Senator HEFLIN. I haven't asked any questions, but let me follow up on this McCarran-Ferguson antitrust exemption.

In the report that you, as chairman of the Tort Policy Working Group made in February of 1986, stated in a footnote, "despite the assertions of some, the working group found no evidence to suggest that the industry's antitrust immunity is a significant factor in the insurance availability for the public crisis." In effect would you say if this issue of antitrust exemption were broadened now, that you would be in agreement and you would recommend to the department that they not support an antitrust exemption? I assume it is on grounds other than the affordability, availability issue. If so, would you tell us those reasons?

Mr. WILLARD. That is certainly true, Mr. Chairman, that our view of the McCarran-Ferguson antitrust legislation does not have anything to do with the affordability availability problem.

As a general matter, the Department's view is that industry specific exemptions from antitrust laws are not a good idea. Unless there is a clearly demonstrated need for it, that should not happen.

With regard to the insurance industry and particularly the part that I have been examining the property casualty industry and its involvement in this crisis, it seems to be basically a very competitive industry. Competition is good, and there is no need or justification for some special umbrella exemption for any anti-competitive activity. We don't think it is going on, based on the evidence we have seen. On the other hand, we don't see any need for this special kind of exemption as an initial matter.

Mr. Rule went on to state yesterday that, of course, it is not an initial matter. We have had a long history of this exemption, and certainly there would be problems in terms of a transition to some new regime that could create a lot of costs and uncertainties. These matters should be considered by the committee before just immediately scrapping the system as it exists now.

Senator HEFLIN. Let's examine the definition of affordability of rates. You see no relationship to increased rates and the antitrust exemption?

Mr. WILLARD. None at all, Mr. Chairman.

In fact, people have commented that the cause of some of the insurance industry's problems, and one of the aspects of this crisis, has been the cyclical nature of the business.

During the late 1970's and early 1980's, the studies indicate there was such strong competition in the insurance industry that there was excessive rate-cutting which caused this roller coaster effect on the rates. That indicates that the industry is highly competitive and that a change in the law would not make it any more competitive than it already is.

Senator HATCH. Mr. Chairman, may I ask a question?

As I understand, your working group came up with the proposition that predictability of losses is probably the most important aspect to achieve affordability of insurance.

Mr. WILLARD. There is no question there. That is what I was trying to say.

Senator HEFLIN. The total request of the Civil Division for the fiscal year 1988 is $13 billion in round numbers. Two point one million dollars is allocated for the automated litigation support service in the tort branch, $2.1 million for the ALS service and $533,000 for an ALS service in the office of immigration. This means that from the budget request of $13.5 million, approximately $5.3 million will be used for technological improvements. This is obviously a high priority of the Civil Division.

Would you comment on that?

Mr. WILLARD. Yes, Mr. Chairman, I would be happy to. We are at an age now where a lot of our litigation is monstrously paper-intensive litigation where discovery requests require hundreds of thousands and millions of pages of documents. The only way our lawyers can keep track of those documents is by using computers and modern technology. Frequently in litigation, our adversaries are big corporations which have many-high priced lawyers and use state of the art technology. If we are going to match forces with them, we have to have the same kind of technology. That is the reason we make this kind of request, so we can keep up with the competition in these kinds of massive lawsuits.

Senator HEFLIN. Senator Hatch.

Senator HATCH. I want to welcome you here. I appreciate your spending time here.

I have to say I think one of the major liability problems has to be the subject of section 1983 litigation. What is your view on litigation of this kind?

Mr. WILLARD. In personal liability kinds of lawsuits?

Senator HATCH. That plus other aspects.

Mr. WILLARD. Most of the 1983 litigation was against State and local governments. The equivalent for the Federal Government is what we call Bivens litigation. Our name for constitutional tort cases brought in the wake of the Supreme Court decision in *Bivens* v. *Six Unknown Named Agents.*

We have had something over 10,000 lawsuits brought against Federal employees in their personal capacity for alleged constitutional torts. We frequently provide representation for those officials, law enforcement agents and others, who are sued in their personal capacities for actions undertaken in their line of duty. We win almost all of the cases. Since the Bivens case was decided, only 30 cases have resulted in favorable verdicts for plaintiffs.

So, it is a lot of litigation and it is very time-intensive, but it is litigation in which we are generally successful in defending the Federal employee.

Senator HATCH. The Civil Division has already begun work in the area of civil penalties. How effective has the department been in recovery of funds?

Mr. WILLARD. The Program Fraud Civil Remedies Act only applies to fraudulent acts after the date of enactment. There will be a

lead period while we are implementing the act and as it applies to conduct after enaction.

With regard to the False Claims Reform Act, we are moving now to have that law applied to ongoing litigation where the government is a party. We will see whether the courts say that application will be effective. Certainly we expect the act's new application to allow us to have more respectable terms or more favorable decisions in future cases. It will probably be several years before that shows up.

Senator HATCH. There has been some confusion regarding the effective date of the False Claims Reform Act. You mentioned that provisions of the reform act apply to pending cases. Can you just give us a little more detail on how the department is interpreting the effective date of this particular law?

Mr. WILLARD. Senator, the usual rule is that a case is supposed to be decided on the basis of the law as it exists at the time the case is decided. Absent a specific indication from Congress for something different, newly enacted legislation should be applied to pending cases.

For the Program Fraud Civil Remedies Act and the Anti-Kickback Enforcement Act, Congress provided that those would only go into effect for actions after the date of enactment. There is no such provision with regard to the False Claims Act. Although the courts have never ruled on it, it is our position that the False Claims Act should apply to any litigation. That is something I think we will end up litigating in the courts, but we will not be in the courts for a while.

Senator HATCH. With regard to insurance, the increase in rates is caused in part by business cycles. In the 1970's there was excess competition. There was some indication that insurance was sold too cheaply at that particular time given tort law uncertainties. Dramatically in the 1980's, insurance rates were raised again, and the rates set the competition. It seems to me we basically agree with that analysis.

Mr. WILLARD. Yes, Senator. In our view, those are the two main factors, the cycle and the increase in tort liability.

Senator HATCH. And excessive competition may have tended to increase the problem.

Mr. WILLARD. I certainly agree, Senator. I don't think the repeal of the McCarran-Ferguson Act would do anything to address either of those two aspects.

Senator HATCH. How about repeal of the antitrust provisions?

Mr. WILLARD. I don't think they would have any effect on either of those.

Senator HATCH. Repeal of the antitrust—it may be middle ground to just repeal the antitrust provisions but it appears to me that repeal would be detrimental in any event.

Mr. WILLARD. I would not go so far as to say it would be detrimental but it does not seem to us that it would have any impact.

In our view at least, it would not have an impact upon the affordability or availability aspects of impact liability insurance. It does not appear to us there will be any effect.

The CHAIRMAN. Let me talk a little bit about budget. I apologize for a sore throat; I am having trouble speaking.

During the last few years, much attention has been focused on broad abuse that seemed to plague government contractors, particularly in the defense industry. The Congress, in many respects led by Senator Grassley, responded to this element, basing legislation on enhancing the ability to protect Federal money in fraud cases. The Justice Department created a special unit in the Criminal Division to handle defense procurement fraud. The initial efforts have not been very successful, partly because of inexperienced staff. This is not according to Joe Biden but to data from the General Accounting Office who are not infallible, I might add. The Civil Division is seeking to substantially step up its role in recovering from fraud cases.

What steps are you taking to assure that the Civil Division avoids what appears to me to be well-documented problems that plague the Criminal Division in this area?

Mr. WILLARD. First of all, Mr. Chairman, I would have to say I doubt the Criminal Division agrees with the GAO characterization of their record, but they should speak for themselves on that issue. They have had some good success in the area of criminal fraud prosecution.

The CHAIRMAN. What are you going to do to avoid the GAO report?

Mr. WILLARD. In the Civil Division, we are moving aggressively to implement this legislation which we have worked closely with this committee in developing last year. Many parts of the legislation were originally included in our own earlier fraud proposals. What we had done was bring together the cases that we were losing because of what we felt were problems in the law. And we asked Congress to address those problems. And you have in the legislation. When we bring cases now there are better chances of success.

One thing the new law will help us do is settle the cases earlier which helps in terms of our manpower. Once we settle a case, we can move on and bring another case instead of spending a lot of time in litigation.

The CHAIRMAN. What are you asking for in the way of manpower?

Mr. WILLARD. We requested as a supplemental appropriation in fiscal year 1987, an increase of 21 positions and $640,000 to implement the new legislation. And then an additional increase in fiscal year 1988 of $350,000 to meet other requirements.

So over this period of time, we have asked for 21 additional positions to deal with these new civil antifraud laws.

The CHAIRMAN. Again, I don't want to draw too much on the GAO report, but let me put it this way; I speak in very frank terms. When a committee like this one changes hands and sets up and restaffs, it takes time. It simply takes time to get it done. Hopefully, I have had some success, and I hope I will be so judged by the public; but it is not something you can do overnight to get good people to come into the government who have experience and competence. It is a very difficult thing. You walk out of your job and go to some law firm at $200,000 a year. I am not being facetious. As I sit down as both a legislator and an administrator who has a several million dollar budget and a staff and a number of

people and a fairly large number of Senators with divergent views, I understand there are some problems. There have got to be problems, it seems to me, with this new legislation in that you have to find in your case 21 new positions, new requirements, new opportunities. Nonetheless, how are you going about getting these 21 positions filled? Are they all attorneys?

Mr. WILLARD. They are not all attorneys. It is a mixture of attorneys and support personnel. We usually have a little more than half our positions filled with attorneys and a little less than half is support personnel.

The CHAIRMAN. I don't want to put you on the spot today, but, again, it would be useful for the committee and for me if you will, and I hope you will, because we have to appropriate the money. I am not being smart when I say that it would be useful to have a sense of not only what positions you want to create but how you are going to go about filling them. I am not talking about whether you are asking for Democrats or Republicans, men, women, blacks, whites, Hispanics. I want to know where you are going for the kind of people you want. What kinds of competence levels do you think they have to possess so this thing gets off to a strong start, rather than what can easily happen in any division, getting off to a slow start as new legislation is attempted to be implemented? Would you be willing to do that?

Mr. WILLARD. I can say as a general matter, and we will provide more details about what we are doing, that one of our primary sourses is our Honors Program. For the last several years the Civil Division has had the highest number of its new hires from the Honors Program in the Department.

The CHAIRMAN. Tell us about it.

Mr. WILLARD. Senator Warner and former Senator Hart were involved in this.

The program was started in the 1950's. It hires lawyers out of law school or coming off judicial clerkships who meet the highest academic standards and who are hired on a competitive basis. Last year, for example, we received over 2,000 applications from lawyers who wanted to work in the Civil Division. We ended up hiring about 258 out of 2,000, so it is a very competitive program.

The CHAIRMAN. Do you think to get this up and running you need some experienced litigators? It would seem to me one of the things I have been looking for again, I don't know the details of the Civil Division nearly as well as you, and maybe I should put this in the form of a question. In order to get this off to a running start, would it be better for you to have some experienced lawyers who have some complicated litigation experience rather than just bright, new hires out of the law schools?

Mr. WILLARD. It certainly would, and that is the other component of our hiring program. Most of the lawyers we hire are experienced litigators, but we do hire a substantial number under the Honors Program as well. I think it good to have a mix. You can't have all chiefs and no Indians.

I think the Honors Program attorneys are a good buy for the government because you don't have to baby them as much. They are very eager and hard working. But then we need a mix of expe-

rienced litigators, too, so we hire people who have experience in either private law firms or in other government agencies.

I can say quite candidly that we can't match the salaries available in the private sector. Starting lawyers who go to Wall Street get $65,000 a year and we, of course, pay less than half of that.

The CHAIRMAN. Having graduated from law school in 1968 I remember that the top job if you went to Wall Street then was $12,500. I realize that is ancient. I remember going back to Delaware to one of the "prestige firms" starting at $100 a week in 1969. If one suggested that was a recognition of my abilities, it was not that. I was the only one offered that. But what stunned me was not merely the starting salary, but you read Wall Street Journal articles saying the average bonus for 1 year hiring was somewhere above a $75,000 bonus. It started off at $65,000. You are all dedicated public servants back here. It is really amazing to me.

Mr. WILLARD. Certainly, this is the problem we have in our hiring. I am surprised we are able to overcome it, but we do find good lawyers interested in the experience, the assignments, and the satisfaction of public service who are willing to do it.

The CHAIRMAN. Do you have any figures within the division on how long you keep lawyers? I know the turnover historically has been rapid, but have there been any changes over the years that you know of? You may not know of them.

Mr. WILLARD. I have a sense that the turnover has become a little more rapid. The people are not staying quite as long as they were. I still think we get a good deal if we can get a young lawyer for three or four years, someone who is energetic and gets the experience and goes on. The experience makes it an attractive place to work. They know it is not a dead-end job and we are not looking for career bureaucrats.

Also, we do maintain a small number of people who are willing to stay for a longer period of time and do provide the institutional knowledge that we have to have.

The CHAIRMAN. One of the problems the Criminal Division had in the defense procurement fraud was that they had to borrow agents from the IRS and the FBI. They did not have adequately trained personnel and it caused a shortage at IRS. How much of a need in this new-found responsibility are opportunities from new legislation, and how many of the 21 personnel really require the expertise in addition to legal experts?

Mr. WILLARD. We like to hire experienced attorneys who have handled complex litigation involving financial matters. What we primarily rely on are the Inspectors General's offices in our client agencies to provide the expertise, the auditors, and other people who can work as part of our teams. Frequently in big defense procurement cases, we will have a team of several lawyers, an auditor from DCAA, or one of the other client agency offices, and they will all work as a trial team. An auditor will be part of the team to provide financial expertise. We do not have an in-house staff of auditing experts. We have to go to other agencies for that.

The CHAIRMAN. Should you?

Mr. WILLARD. I don't think so. I would rather have somebody who is experienced in shipbuilding economics if we have such a case than an all-purpose CPA.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Thank you very much, and let me suggest you will find in the Midwest people enjoy hearing political people talk about defense fraud.

The CHAIRMAN. I got that impression. I just happened to stop over in Iowa on the way to California, 75 times—I don't know why we keep landing there. I was amazed; everybody else talked about the crisis, and what did you get, 94 percent of the vote?

Senator GRASSLEY. Thank you, Mr. Chairman. I see now there has already been a discussion, under Senator Biden's leadership in this area, but I wanted to bring up some of the things where we left off last year.

We have had a chance to work very closely on the False Claims Act and other antifraud acts, and I think we have made some real progress in that area. You and I may not agree on every provision of legislation we passed, but we do share mutual objectives of increasing the government's ability to fight such fraud. As a result, we got together and pushed through some very good legislation.

I guess I brought up with your boss, Mr. Meese, a couple of weeks ago, some talks we have had with some of your colleagues in the Criminal Division of the Attorney General's office about this whole business, as Senator Biden said, prosecuting defendant contract fraud. We had this recent General Accounting Office report that shows that even despite the creation of the special fraud unit at Justice and despite the referral of some 500 cases, there have been very few prosecutions that have resulted. When I asked why so many cases had gone unprosecuted, it seems like I get the answer and maybe I don't appreciate it as much not being a lawyer, but I get the answer that criminal intent is just so very difficult to prove.

Considering that is the environment we are in now, I have three specific questions. I would ask you to compare whether the criminal fraud statutes of this new false claims bill just put on the books contains lower standards and it provides for treble damages. Do you think the new act can help close the gap between the large number of fraud cases detected and the smaller number of fraud cases that are actually prosecuted?

Mr. WILLARD. Yes, I do, Senator. That was one of the reasons we wanted and were able to work with you and other members of the committee in developing this legislation, so that we could make clear that what we are talking about is a civil remedy, a civil standard of intent and, a civil burden of proof. Even in those cases where you can't make a criminal case, we can still bring a civil action to recover treble damages and provide a stronger role in remedying those situations.

Senator GRASSLEY. In addition, I think we have been well aware of problems remaining in criminal and civil attorneys sharing information. That problem, of course, makes it very difficult for these attorneys to work a fraud case together from start to finish. But now since the Civil Division has some very powerful tools, as you suggested, taxpayers dollars, loss of fraud, have you made any plans to make sure that the Civil Division is on the plaint of the hundreds of pending fraud cases?

Mr. WILLARD. We will be using one of these new tools, the Civil Investigative Demand, aggressively as a way of closing some of the gaps created by the Rule 6(e) problem with respect to access to grand jury information. It is going to be a new tool for us. We have not had this authority before although our friends in the Antitrust Division have had it. We will be using it aggressively to obtain that information where we need to. It is not going to make our work easier. It is just a tool. It will allow us to issue a civil investigative demand for documents. That can be a very manpower-intensive job and that is one reason why we have asked for the supplemental appropriation this year, because we expect to keep a lot of people busy using this new tool.

Senator GRASSLEY. Relating to what you just said, it is my understanding that you have about one or two lawyers working with the defense procurement fraud unit, with the prospect of civil action. Is it your idea with more money or let's suppose you don't get more money, what is your idea about assigning more attorneys to that unit?

Mr. WILLARD. Our attorneys on that unit are basically traffic cops. They screen the cases and refer them to other attorneys for handling. We have 30 attorneys and some or all handle some defense procurement fraud cases. So the number of lawyers we have working on procurement fraud is a lot larger than that used to screen the cases initially.

Senator GRASSLEY. We should not draw any conclusion about one or two people there who in any way limit the use that you intend to make of the new tools.

Mr. WILLARD. Absolutely not.

Senator GRASSLEY. In other words, we are saying those two people are adequate to get all of the openings that are possible for your other lawyers to act upon.

Mr. WILLARD. Actually, we have increased it to three and, if we need to, we will send four or five or however many are needed to keep up with the workload. We have a lot of referrals directly from agencies that don't go through the defense procurement fraud unit. They may come from the FBI or elsewhere but our committment to limiting procurement fraud is not limited to just a few people. If necessary, we will put everybody in our entire office on it if necessary.

Senator GRASSLEY. As you know even better than I do, fraud against government can take any wide variety of forms from simple false statements to a whole host of complex charges and many others. I suppose it is typical for attorney to take on only those cases they might have seen before and have had some sort of relationship or experience with so that they obviously can draw on experienced precedent.

In light of the new laws and the likely increase in the number of cases, have you made any plans for training not only with regard to the new laws but also training attorneys on the different types of complex frauds?

Mr. WILLARD. We certainly have. We have prepared a package of materials that have been sent out to all United States Attorneys offices, describing the new legislation and the guidelines for implementing them. In particular, we have moved aggressively to have

the False Claims Act applied, to pending litigation so we can get into the new law right away without waiting 3 or 4 years for cases in the pipeline now.

I am going to the U.S. Attorneys' Conference in Tucson next week where I will be speaking to all U.S. Attorneys, and one of the things I will emphasize to them is the importance of making use of these new tools.

Finally, the attorneys in our civil fraud unit regularly participate in legal education institutes and we expect to continue and expand that so people will know about these tools and make use of them.

Senator GRASSLEY. Could I have a copy of that package that you mailed?

Mr. WILLARD. Certainly, Senator. We would be happy to provide that.

Senator GRASSLEY. Thank you very much.

The CHAIRMAN. I will submit to you, if I may, some questions from our ranking member, Senator Thurmond, who asks you to respond, and his opening statement will be placed in the record as if read.

[Statement of Senator Thurmond follows:]

PREPARED STATEMENT BY SENATOR STROM THURMOND

This morning, the Senate Judiciary Committee will receive testimony on the Civil Division authorization, which is part of the Department of Justice Appropriation Authorization Act, for fiscal year 1988, S. 517, introduced by the distinguished chairman, Senator Biden, and myself at the request of the administration.

The need for reduction in Federal budget deficits require that all Federal Government agencies evaluate priorities, and, of course, the Civil Division of the Department of Justice is no exception. Nonetheless, I believe that the Civil Division, in defending claims against the Government, enforcing programs vital to the national interest, and seeking the recovery of millions of dollars owed the Government, performs an important function for the Federal Government. This role must not be compromised.

In reviewing the proposed authorization and the statement submitted by Assistant Attorney General Willard, it is clear that the Department is moving quickly to implement new programs and fulfill new responsibilities in the fraud and immigration areas in response to legislative enactments in the last Congress.

The proposed authorization also includes an increase in personnel and funding for the commercial branch of the Civil Division to handle government contract disputes, creditor rights of the Government in bankruptcy proceedings, and debt collection. The Department has also asked for more personnel and funding for the torts branch to defend the 6,100 cases against the Government expected next year.

The importance of these branches is amply illustrated by the fact that last year the Department obtained judgments for the Government totaling $73 million while defeating more than 98 percent of the monetary claims brought against the Government, for a savings of nearly $7 billion in would-be damages.

We are pleased to have with us this morning the Assistant Attorney General for the Civil Division, Richard Willard. We welcome you and look forward to your presentation of the Civil Division authorization request.

The CHAIRMAN. I will yield to my colleague from New Hampshire.

Senator HUMPHREY. I am not really ready yet.

The CHAIRMAN. I would like to talk on mass torts for a moment. Some of the experts question whether the present torts system can adequately handle mass tort cases. The ABA Commission raised this as a serious concern. Certainly the public perception of 2,000 plaintiffs, represented by hundreds of different lawyers, holding

court in a high school gymnasium is not what most of us would call fair justice. The Federal Government is involved in some of the most notorious cases, such as the asbestos litigation. I thought you might have some idea as to how these kinds of cases should be handled.

First of all, there was no mention of massive court cases in the separate discrete report. Do you think they should be separate and discrete?

Mr. WILLARD. I think it is important. I don't think it is separate and discrete but there are different aspects of it. One of the problems I see is uncertainty over the application of the law where the legal standard is unclear or where the outcome of litigation is subject to great variation depending on the jury and the skill of the lawyers. This creates a very serious management problem. In some rare mass tort cases, the law is generally settled and on a fairly sufficient basis. An air crash case is a good example. Most air crash cases end up being settled because the law is fairly clear. They have not proved to be a major burden on the courts.

In the area of asbestos, there are signs that problem is being dealt with through the development of the asbestos claims facility by Dean Wellington at Yale Law School. I am hoping more of these type of cases can be resolved out of court as well.

The CHAIRMAN. It seems to me there is an avowed distinction between the massive torts, such as you mentioned, the airline cases and the widespread toxic and environment harm where mass injury develops from a faulty design or faulty product. But should there be different procedures to apply to different categories of mass tort cases?

Mr. WILLARD. It is a little hard to generalize about mass torts, Mr. Chairman, because there are so many different situations. I think the problem of environmental exposure, toxic substance exposure, fundamentally is not a procedural problem but a scientific problem. It is the proof of causation that is difficult to establish and difficult to manage. The traditional legal system can't cope with that very well by just procedural reform. I think we have to decide, as a legal matter, what kind of standards are going to be imposed, if at all, to deal with that.

This is such a complicated topic it is really hard for me to get into answering a question because there are so many different facets to it.

The CHAIRMAN. It seems to me there are so many different facets that lend credence to the view that maybe there are necessarily acceptable parameters from ordinary tort litigation.

I guess the question I have is, given the national aspect of most of these mass tort cases, should they be guided by Federal law instead of State law?

Mr. WILLARD. Again, it would depend upon the nature of the tort itself. In some areas, such as in admiralty, the tort law applies as it has been applied over the years. Accidents occurring on the high seas, for example, are governed by Federal laws rather than State laws. It may be that certain other aspects such as product liability should be governed by Federal law because of its interstate aspects.

Again, because the field of mass torts can include so many different kinds of torts, it is difficult to generalize and say they should

all be considered under one standard or another. Certainly as a practical matter, most mass torts end up in Federal Courts.

The CHAIRMAN. Are Bankruptcy Courts an appropriate forum for some of the problems arising from mass tort cases?

For example, in the case of *Johns Mansville,* the asbestos case you are very familiar with, and the *A. J. Robbins* Dalcon shield case.

Mr. WILLARD. I think it is difficult to apply traditional bankruptcy concepts. Of course, this is a fairly recent phenomenon. It certainly raises questions about whether the bankruptcy laws can deal with them.

The CHAIRMAN. I have no serious doubt that they can, but I don't know what to do about it. Do you have any recommendations? Have you thought that through?

Mr. WILLARD. We have thought that through but we don't have a solution either.

The CHAIRMAN. What alternative dispute resolution techniques could be employed in mass tort cases, if any?

Mr. WILLARD. I think the asbestos claims facility set up by Dean Wellington which I mentioned a moment ago is a promising model.

It seems to me the primary requirement for alternative dispute resolution is a clear understanding of the applicable legal standards. This is true in a lot of areas of the law. Most cases settle out of court. Very few cases are actually tried to a verdict. Predictability makes it easier to settle a case with direct negotiation or some kind of alternative dispute resolution technique. If you have a pretty good idea of what is going to happen if the case is tried, then it is pretty easy to settle a case. But our tort laws have become so unpredictable in recent years, it makes it very difficult to see any kind of immediate solution.

The CHAIRMAN. Thank you. We look forward to seeing your work.

Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

I noted with particular interest the remarks about debt collection. Typically, what sort of litigation is involved in this debt collection? Are the settlements usually out of court?

Mr. WILLARD. The largest number of debt colletion cases are handled at the U.S. Attorneys offices rather than at our division. The challenge there is not a litigation challenge. It is a judgment of the courts. Usually, you can get a default judgment pretty easily against the debtor but the tough question is whether they have assets that you can seize or whether it calls for garnishment or something of that nature.

The kind of cases that we get involved in at the Civil Division are the large collection type matters which frequently involves representing the government as a creditor in bankruptcy proceedings. We have been involved in a number of the major bankruptcies because they involve the Government's interests. A major area involves shipping. The Maritime Administration is the creditor of many shippers. A lot of shippers have gone into bankruptcy recently, so we get involved in protecting the Government's interests in these matters.

Senator HUMPHREY. What programs have resulted in defaults as a result of size of the department itself?

Mr. WILLARD. Some of the Economic Development Administration and small business loans are large enough that they are handled by our operation.

Senator HUMPHREY. How large is large?

Mr. WILLARD. It varies depending on the number of cases and what issues would be involved. But, normally, a case of less than several hundred thousand dollars would be handled by the U.S. Attorneys' office. We are involved where millions of Government dollars are at issue.

The largest case is the *WPPSC* case, where the litigation involves billions of dollars.

Senator HUMPHREY. I note $378 million is the result of these efforts since 1981. Is that through 1986, 5 years?

Mr. WILLARD. That is correct. But I think it is actually 6 years.

Senator HUMPHREY. How much does it cost the Department to collect a dollar?

Mr. WILLARD. In terms of our division expenditures, I believe we collect $6 for every $1 we spend on litigation. It is a fairly favorable return on our investment.

Senator HUMPHREY. Thank you.

The CHAIRMAN. Thank you, Mr. Willard, and I hope you will consider the points we raised earlier about working informally on two problems. If we can't find total resolution, that will prejudice neither the results you are seeking nor the results I am concerned about. I hope we can make some progress.

Thank you very much. I enjoyed your testimony very much, and I will keep the record open for the next 48 hours for any of my colleagues who may have further questions. While there is no timeframe in getting them back, we would like to rule on the budget as rapidly as we can.

Mr. WILLARD. We have a strong incentive to get them back in a hurry.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

[The committee was adjourned at 11:40 a.m., to reconvene subject to the call of the Chair.]

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